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1990 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

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Indiana's Medical Malpractice Act: Results of a Three-Year Study

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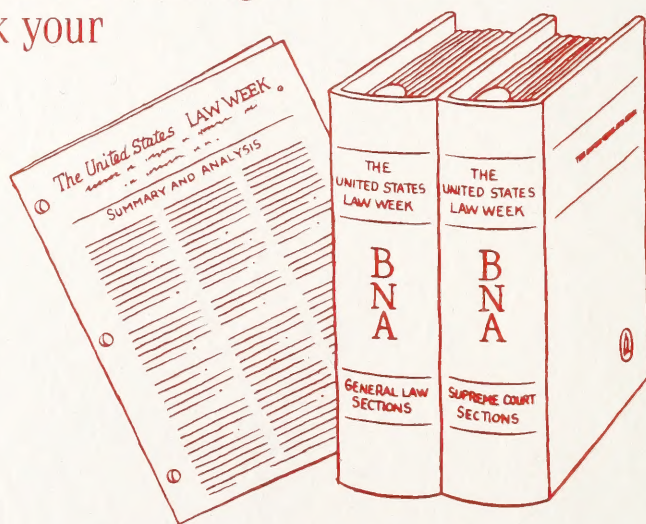
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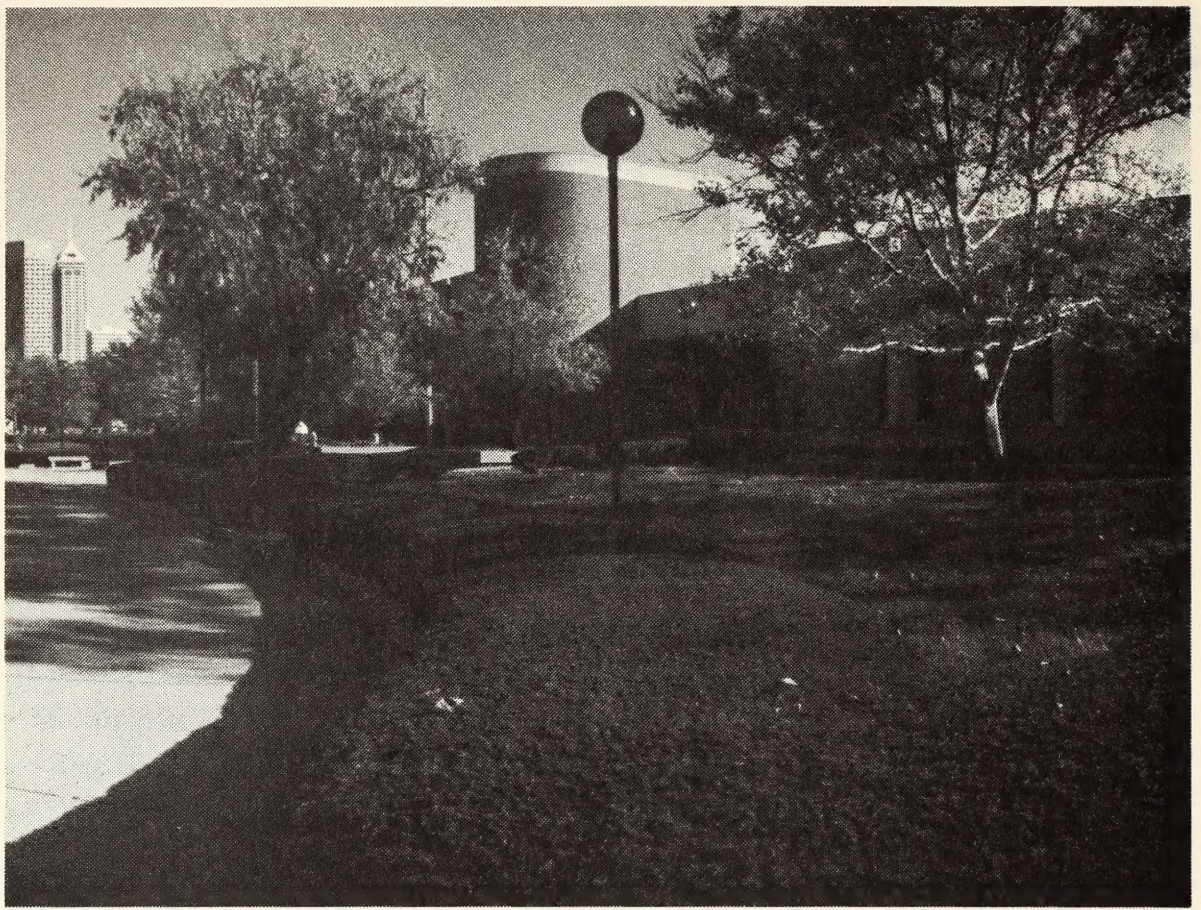
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SURVEY

FOREWORD

Indiana Law, the Supreme Court, and a New Decade

CHIEF JUSTICE RANDALL T. SHEPARD*

Some of Indiana's finest practitioners and professors have contributed to this volume about the progress of Indiana law over the period June 1989 to October 1990. My colleagues have analyzed particular fields of substantive law in which they are expert. The editors have invited me to introduce this survey of the change in Indiana law which this period represents. I do so by highlighting some themes in the Indiana Supreme Court's jurisprudence and by describing the initiatives the court has launched in its role as leader of the state's legal system.

As the Indiana Supreme Court moves into a new decade, it is fitting to begin by assessing the institution's recent progress. Sometimes progress is well illustrated by tables and graphs. Other times it is better described by anecdote. During the 1987-88 campaign for Proposition Two, a proposal to amend the Indiana Constitution so as to provide the supreme court with greater control over its docket, I gave hundreds of speeches explaining the amendment and urging its adoption.¹ At the conclusion of one of those speeches, a lawyer approached me and said he supported the change because it would permit the supreme court to write more

* Chief Justice of Indiana. A.B., Princeton University, 1969; J.D., Yale University, 1972.

1. The origins of this proposal and the case for its adoption were described in Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669 (1988).

civil law by shifting initial review of most criminal matters to the Indiana Court of Appeals. "Candidly," he said, "since I don't practice criminal law, I read your part of the advance sheets with my thumb." By contrast, at the October 1990 meeting of the Indiana State Bar Association, a prominent young bar leader said to me: "I used to read the advance sheets by subject matter. Now I look first to see what the supreme court has done." That was as sure a sign as any graph could provide that Indiana's highest court had turned over a new leaf.

Most who supported Proposition Two did so because they thought it was important to bring the Indiana Supreme Court back into civil law. For the ten years before Proposition Two was adopted, the court accepted review on an average of just twenty civil transfer cases a year. One year, it issued only seven opinions on civil transfer.² Everyone expected that the number of civil cases heard on the merits in the supreme court would rise when the Indiana Court of Appeals took over the job of reviewing all criminal appeals in which the sentence imposed was fifty years or less.

What was not so obvious in the discussion over Proposition Two was that the old constitutional mandate that the supreme court review the merits of every case involving a sentence of more than ten years also placed pressure on the nonadjudicatory aspects of the court's work. These duties are a substantial part of the supreme court's charge. The court oversees a judicial structure that includes some 300 judges and magistrates and nearly 3000 court employees working in more than 100 locations. It also supervises admission of new lawyers and regulates the practice of law by the Indiana bar, currently numbering some 12,000 lawyers.³ The court's supervisory functions suffered from inadequate attention during the past decade just as its civil jurisprudence had suffered.⁴

This foreword to the Indiana Law Review's annual survey summarizes the respect in which 1990 was a turning point both in the court's civil

2. See *infra* note 7.

3. The Clerk of the Indiana Supreme and Appellate Courts informs me that as of November 1, 1990, there were 11,779 lawyers engaged in active practice. Another 2875 inactive lawyers were on our rolls. Thus, there were actually a total of 14,654 lawyers on the roll of attorneys.

4. The supreme court's criminal jurisprudence was also affected by the pressure of this mandatory caseload. The pressure of high volume sometimes led to erratic precedent. Compare *Phillips v. State*, 492 N.E.2d 10 (Ind. 1986) (to establish admissibility of statement made after accused has invoked right to remain silent during custodial interrogation, state must show that accused later initiated dialogue and knowingly waived previously invoked right to remain silent) with *Moore v. State*, 498 N.E.2d 1 (Ind. 1986) (setting aside *Phillips* less than six weeks later, holding that showing that dialogue was initiated by the accused not necessary).

jurisprudence and its nonadjudicatory roles. To describe the new jurisprudence, I have chosen four topics on a rather subjective basis: the march of the common law, use of the state constitution, protection of the environment, and postconviction relief. As for our role as leaders and supervisors of the courts and the profession, I describe what I believe are initiatives that set the Indiana judiciary on a strong course for the new decade. These include an increasing number of oral arguments, major rule reform, reforms affecting legal education, standardization of trial court records, and a better program on judicial ethics.

I. SOME THOUGHTS ON OUR CASE LAW

The adoption of Proposition Two gave the Indiana Supreme Court the authority to shift initial review of criminal cases with sentences of fifty years or less to the court of appeals. The court exercised this authority within a week of the 1988 election, effective for cases docketed after January 1, 1989.⁵ Even though there was a substantial backlog of pre-Proposition Two direct criminal appeals still to be reviewed, the court immediately increased the number of civil transfer cases it heard.⁶ The court decided forty of those on the merits in 1989, a new record. That record lasted only one year. In 1990, the court decided fifty-one civil transfer cases.⁷

5. See Indiana Supreme Court Order of November 14, 1988 (amending IND. APP. R. 4), reprinted in 528-29 N.E.2d XLI (Ind. cases ed.).

6. The fact that the Indiana Supreme Court had better docket control was noticed by our federal colleagues. It prompted discussion in the Seventh Circuit about greater use of the technique of certified questions. *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 142 (7th Cir. 1990) (Ripple, J., dissenting). It also prompted the judges of the U.S. District Court for the Northern District of Indiana to suggest the possibility of extending the certified question procedure to the district court.

7. The shift in the court's docket is reflected by the following table:

<u>Year</u>	<u>Total Opinions</u>	<u>Direct Criminal Appeal Opinions (%)</u>	<u>Civil Transfer Opinions (%)</u>
1990	206	141 (68%)	51 (25%)
1989	346	286 (83%)	40 (12%)
1988	306	268 (88%)	23 (8%)
1987	363	312 (86%)	32 (9%)
1986	445	395 (89%)	21 (5%)
1985	330	291 (88%)	22 (7%)
1984	327	280 (86%)	19 (6%)
1983	323	281 (87%)	24 (7%)
1982	334	285 (85%)	23 (7%)
1981	304	246 (81%)	38 (13%)
1980	270	226 (84%)	21 (8%)

With more control over its docket, the court is now able to select the cases that deserve attention — both civil and criminal. I describe below several areas that captured the court's attention in both civil and criminal law.

A. *"The March of Indiana Common Law"*⁸

In an age when Congress and many state legislatures meet nearly year-round every year, it is easy to forget that a great deal of the law important to the lives of individuals is still common law.⁹ Even though the Indiana Code has grown to more than 12,000 pages, subjects like torts, contracts, landlord/tenant, and employment are still governed substantially by common law. Indiana's courts, especially the supreme court, act on these subjects just as common law courts have done for four or five hundred years. New problems and new formulations of old problems regularly present themselves in the nearly 1.5 million new lawsuits filed each year in Indiana's courts.¹⁰

There was a time when Indiana's supreme court commonly eschewed considering new matters of common law. This tilt was not simply the result of being inundated with criminal appeals; it was imbedded in the court's definition of its proper role. The likelihood was that the court, in hearing a matter on the merits, would say of existing common law: "That is the current law. If you wish to change it, go to the legislature."¹¹

1979	262	210 (80%)	21 (8%)
1978	275	234 (85%)	21 (8%)
1977	164	138 (84%)	12 (7%)
1976	165	137 (83%)	7 (4%)

This chart shows only direct criminal appeals and civil transfers as a percentage of all our opinions. The remaining cases each year cover writs of mandate, criminal transfer cases, and others.

8. *Morgan Drive Away, Inc. v. Brant*, 489 N.E.2d 933, 934 (Ind. 1986).

9. For one recent acknowledgment of the continuing role for the common law, see G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

10. A total of 1,490,091 cases were filed in Indiana courts in 1989. 1 *Division of State Court Administration*, 1989 INDIANA JUDICIAL REPORT 55.

11. E.g., *Morgan Drive Away*, 489 N.E.2d at 934 (changes in employment at will doctrine "better left to the legislature"); *Hundt v. La Crosse Grain Co.*, 446 N.E.2d 327, 329 n.1 (Ind. 1983) (change from contributory negligence doctrine to comparative negligence doctrine "a matter for legislative enactment rather than judicial adoption"); *State v. Ingram*, 427 N.E.2d 444, 448 (Ind. 1981) ("Absent a clear mandate from the legislature to require Indiana automobile riders to wear seat belts, we are not prepared to step into the breach and judicially mandate such conduct."); *Budkiewicz v. Elgin, Joliet & Eastern Ry.*, 238 Ind. 535, 555, 150 N.E.2d 897, 907 (1958) (Achor, J., dissenting), *overruled*, 241 Ind. 463, 173 N.E.2d 314 (Ind. 1961) (laws regarding negligence liability of railroads

Of course, rejection of a new proposition of law is hardly an act of neutrality. Whether the court rejects a new proposition of law or rejects the idea of making law, it still decides in favor of the status quo.

During 1990, by contrast, the court flatly declared a willingness to grapple with the merits of new propositions of common law. This declaration occurred as we took up the proposal to recognize a new cause of action in tort, a suit for loss of parental consortium, in the case of *Dearborn Fabricating & Engineering Corp. v. Wickham*.¹² The Indiana Court of Appeals had decided a comparable case on the grounds that a proposed new cause of action should be taken to the legislature.¹³ The supreme court expressly rejected this idea, stating: "To the contrary, we find the question of whether the common law should recognize a child's action for loss of parental consortium to be entirely appropriate for judicial determination."¹⁴ Ultimately, the court held that accepting the proposed new cause of action would not improve the state's tort law.¹⁵

Our court has recently addressed a number of areas of common law. In *Stropes v. Heritage House Childrens Center*, for example, we examined the doctrine of respondeat superior and its common carrier exception.¹⁶ In *Klotz v. Horn*,¹⁷ we addressed riparian rights in determining whether an express grant of an easement to a lake included a right to build a pier at the end of the easement. We examined Indiana's rules of contract construction in *First Federal Savings Bank of Indiana v. Key Markets, Inc.*¹⁸ We also held that a settlement agreement in an employment dispute can condition the terms of a relationship that would otherwise be one of employment at will in *Speckman v. City of Indianapolis*.¹⁹ We focused on the landlord-tenant relationship, specifically

"should be changed only by legislative enactment").

This approach was also applied to judicial interpretation of statutes. Compare *Miller v. Mayberry*, 506 N.E.2d 7, 11 (Ind. 1987) (change in judicial interpretation of statute must come from legislative change) with *id.* at 12 (Shepard, J., concurring in result) ("[J]udges should regard themselves as responsible for rules they have erected.").

12. 551 N.E.2d 1135 (Ind. 1990).

13. *Barton-Malow Co. v. Wilburn*, 547 N.E.2d 1123, 1126 (Ind. Ct. App. 1989) ("In *Dearborn Fabricating & Engineering Corp. v. Wickham* (1988), Ind. App., 532 N.E.2d 16, *trans. pending*, it was suggested that this Court need not defer to the legislature in recognizing a cause of action for loss of parental consortium. However, if the action is to be created, it is wiser to leave it to the legislative branch with its greater ability to study and circumscribe the cause."), *modified*, 559 N.E.2d 600 (Ind. 1990).

14. *Wickham*, 551 N.E.2d at 1136.

15. *Id.* at 1139.

16. 547 N.E.2d 244 (Ind. 1989).

17. 558 N.E.2d 1096 (Ind. 1990).

18. 559 N.E.2d 600 (Ind. 1990).

19. 540 N.E.2d 1189 (Ind. 1989).

whether a binding covenant to repair may be inferred from a landlord's statement to a tenant at the inception of an oral lease, in *Childress v. Bowser*.²⁰ We also examined the duty of landowners to protect business invitees in two separate cases.²¹

In the midst of all this common law litigation, the Indiana Supreme Court still has been quite clear about its duty to give full force and effect to legislation modifying the common law. In the 1988 case *Picadilly, Inc. v. Colvin*,²² we held that the legislature's enactment of a remedy for drunk driver dramshop liability claims had not occupied the field.²³ In *Koske v. Townsend Engineering Co.*,²⁴ we concluded that the legislature intended to codify the entire law of products liability, and we held that a common law defense not mentioned did not survive the codification.

B. Yes, Indiana Has a State Constitution

A second turning point in the Indiana Supreme Court's jurisprudence during the period was the court's use of the Indiana Constitution to resolve issues that previously would have been resolved only by reference to the United States Constitution. State courts across the country increasingly have relied on their own constitutions for almost two decades, but most commentators did not notice the movement until 1975 when Justice William Brennan, dissenting from a Burger Court decision on the constitutional rights of criminal defendants, urged state courts to use their own constitutions to afford protections not available under the federal charter.²⁵

20. 546 N.E.2d 1221 (Ind. 1989).

21. *Douglass v. Irvin*, 549 N.E.2d 368 (Ind. 1990); *Sowers v. Tri-County Tel. Co.*, 546 N.E.2d 836 (Ind. 1989).

22. 519 N.E.2d 1217 (Ind. 1988).

23. The role of this statute in the scheme of common law dram shop liability is analogous to the relation of motor vehicle driving offense statutes to the common law duty of drivers to exercise reasonable care for the safety of others. Rather than preempting the common law, such statutes designate certain minimal duties but do not thereby relieve persons from otherwise exercising reasonable care.

Id. at 1220.

24. 551 N.E.2d 437, 442 (Ind. 1990); *see also* *FMC Corp. v. Brown*, 551 N.E.2d 444 (Ind. 1990); *Miller v. Todd*, 551 N.E.2d 1139 (Ind. 1990).

25. *Michigan v. Mosley*, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting). For a more thorough discussion of the view that Brennan hardly started this movement but only gave it visibility, *see* Shepard, *State Constitutions: State Sovereignty*, INTERGOVERNMENTAL PERSPECTIVE, Summer 1989, at 10. *See also* Falk, *The Supreme Court of California, 1971-1972: Foreword—The State Constitution: A More Than "Adequate" Nonfederal Ground, Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125 (1969); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 396 n.70 (1980) (providing extensive bibliography).

Indiana lawyers have been accustomed, of course, to litigation based on the Indiana Constitution when questions affecting the organization of state government are at issue. A recent example of this important but traditional role was *State Election Board v. Bayh*,²⁶ in which the supreme court held that the leading contender for governor, the eventual choice of the voters, was eligible for election as governor under the residency requirements in the state constitution. Another example was the court's affirmation of the constitutionality of a law designed to rescue the township poor relief system in Lake County.²⁷ Yet another was the court's invalidation of a legislative act creating a program utilizing interest on attorney trust accounts to finance legal services for the poor.²⁸

During 1989-90, the supreme court applied the Indiana Constitution to issues quite different from government organization. The Indiana Constitution played a vital role in resolving a major civil case, *Kellogg v. City of Gary*.²⁹ In *Kellogg*, the court held that article I, section 32 had been violated when the Gary city administration refused to make available applications for gun permits. This was a cause of action that does not exist under the second amendment to the U.S. Constitution.

*Cooper v. State*³⁰ focused international attention on Indiana's judicial system after Paula Cooper, who was fifteen years old when she murdered elderly Ruth Pelke, was sentenced to death. The court vacated Cooper's death sentence on two grounds. The principal basis for the decision was the requirement in article I, section 16 of the Indiana Constitution that criminal penalties be proportionate to the nature of the offense. In light of the legislature's 1987 decision that persons under sixteen should not be subject to the death penalty in the future,³¹ the court concluded it would be disproportionate to make Paula Cooper the only person ever executed in Indiana for an act committed at age fifteen. The second ground for deciding the case, clearly declared to be separate and independent,³² was the U.S. Supreme Court's decision that a similar Oklahoma statute violated the eighth amendment.³³

Paula Cooper's case was not the only one supporting the idea that the Indiana Constitution imposes certain limits on criminal sentencing.

26. 521 N.E.2d 1313 (Ind. 1988).

27. Lake County Council v. Allen, 524 N.E.2d 771 (Ind. 1989).

28. *In re* Public Law No. 154-1990 (H.E.A. 1044), 561 N.E.2d 791 (Ind. 1990).

29. 562 N.E.2d 685 (Ind. 1990).

30. 540 N.E.2d 1216 (Ind. 1989).

31. After Cooper was sentenced to death but before her appeal was decided, the Indiana General Assembly passed a bill that prohibited imposition of the death penalty on persons who committed murder at age 15 or younger. The bill was prospective and did not purport to apply to Cooper's case. *Id.* at 1217.

32. *Id.*

33. Thompson v. Oklahoma, 487 U.S. 815 (1988).

During 1990, that concept became more firmly imbedded in our case law. The court restated its previous position that the U.S. Supreme Court's interpretation of the eighth amendment, as applied to lengthy prison terms in *Solem v. Helm*,³⁴ did not adequately address the rights possessed by persons under article I, section 16 of the Indiana Constitution.³⁵ The test under the Indiana Constitution was outlined four years ago in *Taylor v. State*³⁶ and *Mills v. State*,³⁷ which held that article I, section 16 of the Indiana Constitution afforded greater protection to individuals than the eighth amendment.

The supreme court applied the rule of *Taylor* and *Mills* again in *Michael Lee Clark v. State*³⁸ when it set aside a thirty-two-year penalty for driving while intoxicated on the grounds that it was not proportionate to the offense and the offender. The court explained:

The fact that appellant's sentence falls within parameters affixed by the legislature does not relieve this Court of the constitutional duty to review the duration of appellant's sentence as it is possible for the statute under which appellant is convicted to be constitutional, and yet be unconstitutional as applied to appellant in this particular instance.³⁹

Although the tradition of reluctance of appellate courts to alter a sentence on appeal will continue, I think there is some willingness to consider cases on the individual merits rather than to rule out all requests for alteration. New recognition of the role of the Indiana Bill of Rights has provided the foundation for this possibility.⁴⁰

Independent adjudication under the Indiana Constitution presents certain challenges to advocates. Although lawyers are accustomed to state constitutional litigation on issues like separation of powers, they

34. 463 U.S. 277 (1983).

35. *Cash v. State*, 557 N.E.2d 1023 (Ind. 1990).

36. 511 N.E.2d 1036, 1039 (Ind. 1987) ("Our state Constitution mandates that the penalty be proportioned to [the] 'nature' of the offense. . . . [T]he proportionality analysis of a habitual offender penalty has two components. First, a reviewing court should judge the 'nature' and gravity of the present felony. Second, the court should consider the 'nature' of the prior offenses.").

37. 512 N.E.2d 846 (Ind. 1987) (first factor in *Taylor* analysis is gravity of primary offense, second factor is nature of earlier crimes).

38. 561 N.E.2d 759 (Ind. 1990).

39. *Id.*, slip op. at 10. This expression makes explicit that which was implicit in *Taylor* and *Mills*: a sentencing statute may be "constitutional as applied" under art. I, § 16 of the Indiana Constitution.

40. In the wake of *Taylor* and *Mills*, I predicted in this law review that some future litigant would obtain relief. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 583 (1989).

sometimes find it difficult to express state constitutional claims in ways that do not simply parrot traditional federal grounds.⁴¹ The court has declined to consider Indiana Constitutional arguments when the advocate cites a provision of the state constitution but fails to offer any independent analysis.⁴²

C. It Was the Twentieth Anniversary of Earth Day

Environmental law is another field where the supreme court has exercised its new-found freedom to choose important cases. During 1989-90, the court heard cases involving the protection of land, the improvement of air quality, and the preservation of aquatic life, all in one twelve-month period.

The leading environmental case of the year was *Department of Natural Resources v. Indiana Coal Council, Inc.*,⁴³ in which a unanimous court upheld the state's program of preserving archaeological heritage from destruction during coal mining. The Department of Natural Resources had designated for protection from strip-mining 6.57 acres of potentially mineable land, known as the Beehunter Site and located on a 300 acre farm that was rich in coal deposits. It indicated that the landowner could either mine the contiguous land and leave the Beehunter site intact or accept a mitigation plan under which experts would record and preserve any archaeological material found on the site. The site's owners contended that the Department's designation constituted a taking under the fifth and fourteenth amendments to the U.S. Constitution, but the court stated:

The regulations as applied to [the owner's] property through the director's order and mitigation plan bear a substantial relation to the legitimate state interest of preserving our cultural heritage by protecting culturally significant data from strip mining. They are, thus, a legitimate exercise of the State's police power and since the economic impact of the regulations is slight, they do not amount to an unconstitutional taking of [the owner's] property.⁴⁴

Air quality was at the heart of *State v. Costas*,⁴⁵ in which former state senator William Costas challenged regulations of the Indiana Air Pollution Control Board requiring motor vehicle emission tests in two northwest Indiana counties and two counties near Louisville.⁴⁶ The pro-

41. Indiana lawyers are not alone. See, e.g., *State v. Jewett*, 146 Vt. 221, 223, 500 A.2d 233, 235 (1985).

42. See, e.g., *Light v. State*, 547 N.E.2d 1073 (Ind. 1989); *St. John v. State*, 523 N.E.2d 1353 (Ind. 1988).

43. 542 N.E.2d 1000 (Ind. 1989), cert. denied, 110 S. Ct. 1130 (1990).

44. *Id.* at 1007.

45. 552 N.E.2d 459 (Ind. 1990).

46. Senator Costas was charged with a class C infraction for failing to have his

gram was designed to reduce the ozone and carbon dioxide levels in the air of those four counties to safe levels. In defending himself, Costas alleged that requiring emission testing in just four counties violated the privileges and immunities clause of the Indiana Constitution.⁴⁷ He also alleged a violation of the equal protection clause of the United States Constitution. The trial court granted Costas's motion for summary judgment⁴⁸ on grounds that the regulations were unconstitutional, under both the Indiana and federal constitutions, as applied to the two northwest Indiana counties. On appeal, the court rejected these claims, saying that it could find no evidence that the program operated in a discriminatory manner against a protected class of persons.

The preservation of aquatic life was the underlying issue in *State ex rel. Ralston v. Lake Superior Court*,⁴⁹ part of a continuing fight between commercial fishermen and sport fishermen. This lengthy saga ran through both state and federal courts at the same time.⁵⁰ The Department of Natural Resources had embarked on a multi-year program to stock Lake Michigan and protect the results of this stocking by outlawing use of gill nets by commercial fishermen.⁵¹ The Indiana Supreme Court affirmed the implementation of the Department's program once in *Ridenour v. Furness*,⁵² but intervened a second time after the Lake Superior Court held the director of the Department of Natural Resources in contempt and threatened to jail him if he persisted in enforcing regulations designed to limit commercial fishing. The court issued a writ prohibiting the superior court from exercising any further jurisdiction.⁵³

In short, the Indiana Supreme Court has used a portion of its new freedom to take up one of the major legal issues of the day, the environment. It was an appropriate decision, made just in advance of the twentieth anniversary of Earth Day, April 22, 1990.

46. Senator Costas was charged with a class C infraction for failing to have his automobile emissions tested pursuant to state regulations. *Id.* at 460.

47. Article I, § 23 of the Indiana Constitution states: "The General Assembly shall not grant to any citizens, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

48. Costas actually moved to dismiss the charge under IND. TRIAL R. 12(B). However, the trial court held an evidentiary hearing on the motion, thus converting it into a motion for summary judgment. *Costas*, 552 N.E.2d at 462.

49. 546 N.E.2d 1212 (Ind. 1989).

50. See *Burns Harbor Fish Co. v. Ralston*, No. IP 89-433-C (S.D. Ind. Nov. 30, 1989) (WESTLAW, 1989 WL 150471, S.D. Ind.).

51. Gill nets are used by commercial fishermen to catch perch, but the nets also catch protected trout and salmon. *Ralston*, 546 N.E.2d at 1213.

52. 514 N.E.2d 273 (Ind. 1987).

53. *Ralston*, 546 N.E.2d at 1213.

D. Post-Conviction Relief: Is the Trial Ever Over?

Questions surrounding Indiana's system for post-conviction relief were prominent on the court's agenda during 1989-90, and there is every prospect that they will stay there. The jurisprudence was hotly debated through the early 1980s as the result of two cases, *German v. State*⁵⁴ and *Austin v. State*,⁵⁵ holding that a criminal defendant who pled guilty was entitled to plead anew if the trial judge accepting the plea omitted any advisement of rights required by statute. Several years of experience with this case law and a change in the membership of the supreme court ultimately led to a change in jurisprudence.⁵⁶ In *White v. State*,⁵⁷ the court declared the *German* rule had "visited felony convictions with all the finality of default judgments in small claims court,"⁵⁸ and the court overruled both its former authorities. It adopted a standard akin to the one used in federal courts for similar prisoner claims.⁵⁹

During 1989-90, the court sought to refine further the substantive law of post-conviction relief and to alter post-conviction procedure in a way consistent with the posture taken in *White*. First, in *Moredock v. State*,⁶⁰ the court refused to extend the rule of *Ross v. State*,⁶¹ which holds that a court cannot accept a plea of guilty from a defendant who professes innocence. *Moredock* claimed the benefit of this rule because he told the probation officer writing his pre-sentence report that he had not committed the crime. We held that *Ross* applied only to protestations of innocence made to the judge.⁶²

Second, in *Daniels v. State*,⁶³ the court modified its previous posture on the retroactivity of new rules of law. It held that the prohibition on victim-impact evidence, announced in 1989 by the U.S. Supreme Court in *South Carolina v. Gathers*,⁶⁴ would not apply to *Daniels*'s trial, which had been concluded on direct appeal before *Gathers* was decided.⁶⁵

The court also adopted new rules governing second and subsequent petitions for post-conviction relief. These rules clearly establish that a

54. 428 N.E.2d 234 (Ind. 1981).

55. 468 N.E.2d 1027 (Ind. 1984).

56. We are not the only court of last resort where this happens. See *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) (listing cases in which the U.S. Supreme Court has changed its jurisprudence).

57. 497 N.E.2d 893 (Ind. 1986).

58. *Id.* at 900.

59. *Id.* at 905-06.

60. 540 N.E.2d 1230 (Ind. 1989).

61. 456 N.E.2d 420 (Ind. 1983).

62. *Moredock*, 540 N.E.2d at 1231.

63. 561 N.E.2d 487 (Ind. 1990).

64. 490 U.S. 805 (1989).

65. *Daniels*, 561 N.E.2d at 490.

trial court may dismiss petitions it deems frivolous. They also provide that the state public defender shall be permitted to withdraw his or her representation when he or she deems the petition to be without legal merit.⁶⁶

II. LEADERSHIP OF THE JUDICIARY

A. Oral Argument

When I was sworn in as chief justice, I articulated the hope of my colleagues "that lawyers will more often have the chance to argue their cases in person and that the public will more often have the occasion to see us in the courtroom."⁶⁷ Oral presentation was one of the traditions of appellate advocacy left behind in the effort to contend with hundreds of criminal cases each year. An early sign of the court's renewed determination to hear more arguments was our decision in April 1987 to order oral argument in the direct appeal of every capital case, whether the parties requested it or not.

During 1990, the court pursued oral argument with a vengeance. Arguments were scheduled in fifteen of the first twenty weeks of the year. And, as the Appendix demonstrates, by the end of the year the number of people invited to present their cases in person was nearly double the number invited in 1989.⁶⁸

On January 8, 1990, the court began issuing weekly schedules of arguments for the benefit of the press and the public. The *Indiana Lawyer*, a new bi-weekly newspaper published by the Indianapolis Business Journal, and *Indiana Legislative Insight*, a weekly political newsletter, published these schedules. This permitted lawyers involved in cases similar to those being heard by the supreme court to attend our arguments.

A court that is more visible is a court in which the people can have greater confidence. I hope we can find new ways to make the Indiana

66. IND. POST-CONVICTION R. 1(12).

67. We aspire as a court to dedicate more of our time to the legal problems which affect the average citizen: child support and custody, landlord-tenant disputes, commercial law, negligence, product liability, and the like. We hope to work our way out from under the mountain of repetitive matters and have the time to write fewer opinions and write them better. We hope that lawyers will more often have the chance to argue their cases in person and that the public will more often have the occasion to see us in the courtroom.

Remarks by Randall T. Shepard on Assuming the Office of Chief Justice, Old Vanderburgh County Courthouse, Evansville, Indiana (Mar. 4, 1987), *quoted in* Shepard, *supra* note 1, at 685.

68. See app., *infra* at 521.

Supreme Court more accessible to the public and the profession.

B. A Niagara of Rule Reform

The book that sits on the desks of most Indiana lawyers, called Indiana Rules of Court, contains 1093 pages in its 1990 version. Almost two-thirds of it consists of rules adopted by or approved by the Indiana Supreme Court.⁶⁹ In urging the passage of Proposition Two, I suggested that this was an area that needed more attention and would receive it if Proposition Two were passed.⁷⁰

In the first full year after the constitution was amended, the Indiana Supreme Court issued the most sweeping set of rule changes since the adoption of the trial rules in 1970.⁷¹ The court amended over fifty existing rules in November 1989 and adopted several totally new ones. These amendments covered seventy-eight pages when published in the *Northeastern Reporter, Second*.⁷²

These changes covered everything from the death penalty to small claims. One rule change was designed to accelerate the appeal of death penalty cases. Criminal Rule 24(D) mandates that trial transcripts be prepared by use of computer-assisted technology (CAT). The traditional method created long delays in the first step of death penalty appeals. Commonly, preparation of the transcript would consume a year; sometimes more than two years were required.⁷³ Use of CAT has reduced transcript preparation time dramatically. When the transcript was filed in *Matheney v. State*,⁷⁴ it was only the second timely transcript from the originating county in ten years of capital case filings.

69. The principal vehicle through which the court acts is the Committee on Rules of Practice and Procedure. IND. TRIAL R. 80. That committee receives and considers proposals for rule reform, particularly in the Indiana Rules of Trial Procedure, through its own deliberations and through a process of notice and comment.

Other organs of the court also have need from time to time for alterations in the rules applicable to their operations. Each fall, the various proposals for rule reform are submitted for consideration by the full court.

70. Commencement Address by Randall T. Shepard, Indiana University School of Law-Indianapolis (May 10, 1987), *reprinted in* THE LAW PRACTITIONER, Summer 1987, at 4.

71. Bruce Kotzan, the State Court Administrator, said, "This is the most the court has done since I've been here, and that's 15 years." *State High Court Issues Sweeping Changes in Rules*, Louisville Courier-Journal, Dec. 1, 1989, at B3, col. 2.

72. 542 N.E.2d XXXI-CIX (Ind. cases ed.).

73. One case that took two years for the transcript to be filed was *Evans v. State*, No. CR85-235C (Marion Super. Ct. 1986), *appeal docketed*, No. 49S00-8704-CR-453 (Ind. Mar. 15, 1989).

74. No. 45G02-9001-CF-00022 (Lake Super. Ct. 1990), *appeal docketed*, No. 45S00-9002-DP-116 (Ind. Sept. 20, 1990).

The court adopted a new rule to define for the first time the meaning of the "character and fitness" required of a bar applicant.⁷⁵ Yet another new rule advanced truth in attorney advertising by requiring unsolicited communications to a potential client to be identified as advertising and submitted to the Supreme Court Disciplinary Commission.⁷⁶

Although it is clear that the breadth of the 1989 rule amendments was necessitated in part by years of neglect, they represent more than a mere spring cleaning after a long winter. The court now has the time and the determination to do more in the way of rulemaking on a regular basis. We encourage practitioners and judges to help us identify rules that need improvement.

C. Legal Education

As gatekeeper for admission to the bar, the supreme court also plays a role in legal education. In 1989, the court acted on a series of proposals advanced by Indiana's law schools and by the Indiana State Bar Association. Adoption of these proposals brought Indiana closer to the national norms established by the American Bar Association for education and admission to the bar. Their adoption was a logical second step after the court's decision in 1988 to require that applicants for the bar examination graduate from an ABA-accredited law school.⁷⁷

The court trimmed substantially the requirements under Bar Admission and Discipline Rule 13(V)(C) that law students take a particular mix of courses in order to be eligible to take the bar examination. Indiana has been one of only two states with such a requirement.⁷⁸ The court agreed to reduce the number of required credit hours by approximately twenty-five percent⁷⁹ and removed altogether some required courses, like equity. The court's prior rule specified fifty-three credit-semester hours of courses.⁸⁰ This obviously constituted a considerable proportion of the credit hours required for graduation and tended to

75. IND. BAR ADMISSION AND DISCIPLINE R. 13(IV)(A) (1990).

76. IND. RULES OF PROFESSIONAL CONDUCT Rule 7.3(c) (1990).

77. At the time, Indiana, California, and Georgia were the only three states that permitted graduates of law schools not accredited by the A.B.A. to take their bar examinations. Since Indiana's action, Georgia has chosen to require graduation from an ABA-accredited law school for all persons applying to take the Georgia bar after Jan. 1, 1998. GA. CT. & BAR RULES 12-8 (1990).

78. South Carolina requires classes in 14 subject areas before an applicant may sit for the bar exam. *Comprehensive Guide to Bar Admission Requirements*, 1990 A.B.A. SEC. LEGAL EDUC. & ADMISSION TO BAR & NAT'L CONF. OF BAR EXAMINERS 10-12.

79. The court reduced the number of required credit-semester hours to 41. IND. BAR ADMISSION AND DISCIPLINE R. 13(V)(C) (1990).

80. IND. BAR ADMISSION AND DISCIPLINE R. 13(V)(C) (1989).

drive students' course choices. The rule also had the effect of limiting the ability of Indiana law firms to recruit from other states. A student attending law school in another state would have no particular reason to choose courses that complied with Indiana's Rule 13 unless the student knew early on that he or she would come to Indiana to practice. In an era of increasing mobility, we thought it was wise to reduce this barrier to national recruiting by Indiana's firms.

The law schools and bar also proposed restricting what had frequently been called the "two-year rule." This rule permitted students to take the bar examination after completing two years of law school. A student who passed the examination on this schedule was eligible for induction immediately after graduation.⁸¹ This rule had the advantage of making students eligible for hiring as practicing lawyers immediately after commencement, but it had other effects that were not so attractive. Law schools reported that some who studied for the bar examination during their third year as law students were noticeably less prepared for their regular studies in law school. Schools also reported that students who passed the bar examination, say, in February of their third year, were less concerned about their performance during the final weeks of law school. The court's new rule permits students to take the bar examination before graduation only if they are within 100 days and five credit hours of graduation.⁸²

D. Initiative on Judicial Ethics

We announced the most significant series of actions on judicial ethics in anyone's memory in September 1989.⁸³ First, the Judicial Center dedicated the annual meeting of the Judicial Conference of Indiana to judicial ethics. Judicial ethics experts from Indiana and the nation presented a complete day's program to the state's 300 judges.

Second, the Judicial Conference created a permanent committee on judicial ethics. I appointed twelve judges to the committee and selected Monroe Superior Court Judge Marc R. Kellams to serve as chairman. For the first time, judges serving on city and town courts were included

81. *Id.* at 13(VII).

82. IND. BAR ADMISSION AND DISCIPLINE R. 13(V)(C) (1990). IND. BAR ADMISSION AND DISCIPLINE R. 13(VII) (1990) grandfathers all students who were enrolled in an approved law school on Jan. 1, 1990.

83. *Judges Act on Ethics*, Indianapolis News, Sept. 13, 1989, at C1, col. 1 (home ed.); *New Panel May Revise Code of Judicial Conduct*, Indianapolis Star, Sept. 14, 1989, at B3, col. 1. The Star's editorial board applauded these initiatives. "If ethical standards are to rule conduct effectively, they must be expressed clearly and often. Strengthening and emphasizing standards for Indiana judges is a sound move." *Honest Judges*, Indianapolis Star, Sept. 16, 1989, at A16, col. 1.

on the conference committee.⁸⁴ The committee was charged to create a regular ethics program for Indiana judges. The committee also will examine the recent changes in the American Bar Association's Model Code of Judicial Conduct, compare these with Indiana's Code of Judicial Conduct, and recommend such changes in Indiana's Code as the committee deems necessary.

Third, the Commission on Judicial Qualifications issued to each Indiana judge a set of advisory opinions covering ethical questions commonly raised by judges. Public advisory opinions were themselves a new tool, first used by the Commission in 1988.⁸⁵

The supreme court's own contribution to this activity came in two sets of rules governing the discipline of judges. In early 1989, the court issued rules governing disciplinary actions involving members of the court itself.⁸⁶ More important for the long run, we finished the year by issuing a comprehensive set of rules of procedure for disciplinary matters involving judges.⁸⁷ These rules clarify the procedure under which the supreme court exercises its authority to discipline judges by collecting in one place rules that were previously scattered throughout the Indiana Code⁸⁸ or that existed only as unwritten custom.

84. These were Judge Anthony J. Cefali, Hobart City Court; Judge Roger L. Lindsey, Jeffersonville City Court; and Judge Cecelia J. McGregor, Goshen City Court.

85. For the first 19 years of its existence, the Commission routinely gave ethical advice to judges by telephone or private correspondence. In 1988, the Commission began publishing advisory opinions in response to questions of general interest. *See, e.g.*, 33 RES GESTAE 134 (Sept. 1989) (Commission's first public advisory opinion); 34 RES GESTAE 86 (Aug. 1990) (Advisory Opinion #2-90, addressing the propriety of a judge publicly expressing personal views on the morality of abortion). Today, the Commission receives requests from individual judges for written advice concerning questions on judicial ethics. After the Commission members discuss the appropriate answer to the question posed, staff counsel Margaret Babcock drafts an advisory opinion reflecting the Commission's discussion. The Commission finally reviews every opinion before it is issued. Each advisory opinion is provided to all Indiana judges and is submitted for publication to RES GESTAE, the monthly journal of the Indiana State Bar Association. Although the views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, which is the ultimate authority on the Code of Judicial Conduct, the Commission does consider compliance with an advisory opinion to be a good faith effort to comply with the Code.

86. IND. BAR ADMISSION AND DISCIPLINE R. 25(G)(4) (originally adopted Mar. 2, 1989).

87. IND. BAR ADMISSION AND DISCIPLINE R. 25 (1990). The previous version of Rule 25 was one sentence. The new rule covers more than 11 pages and is the product of an ad hoc committee of the Indiana Commission on Judicial Qualifications led by Commission Vice-Chair Sara B. Davies. The principal drafters were Bruce A. Kotzan, counsel to the Commission, and Margaret Babcock, staff attorney for the Commission.

88. *Compare* IND. CODE ANN. § 33-2.1-5 (West 1983) (laws controlling discipline of judges) *with* IND. CODE ANN. § 33-2.1-6 (West 1983) (laws controlling discipline of superior, probate, juvenile, and criminal court judges).

E. Trial Court Operation

The supreme court's role in supervising the operation of the trial courts, traditionally a modest one, has been a significant area of activity during the last half decade. During 1989-90, the court moved forward from this base with the assistance of Bruce A. Kotzan and the Division of State Court Administration.

The most significant initiatives have attempted to standardize the paperwork and record-keeping functions of trial courts, which process an estimated ten million documents per year. Historically, each county kept records as it thought best, using methods frequently based on tradition or inertia. Traveling from one county seat to another was more like passing from Albania to Yugoslavia than like visiting two parts of the same state judicial system.

In late 1989, the court adopted a comprehensive set of rules governing the record-keeping practices in the trial courts and the clerks' offices. These practices were tested in several counties and adjusted based on these experiences. They became mandatory in all counties on January 1, 1991.⁸⁹ This new system is explained in a manual provided to every county, by a series of seminars, and through on-site technical assistance. These rules follow earlier landmarks such as the uniform case numbering system (designed to simplify analysis of caseloads), the micrographic standards (designed to protect our permanent records), and the record retention schedule (designed to insure that we keep what we need and throw away paper that nobody needs).

The record retention schedule and the work of the Division of State Court Administration in implementing it have been a particularly spectacular success. In 1989 alone, the Division's staff assisted in the destruction of 700 four-drawer file cabinets full of unneeded documents. The county clerks destroyed an additional 300 cabinets of dismissed cases, documents that were routinely retained before our rule was promulgated.

The court also dispensed funds directly to trial courts for the first time. Our office of guardian ad litem/court-appointed special advocates is distributing \$800,000 during the 1989-91 biennium to assist juvenile and family courts in providing better representation for children. The court is also home to the new Public Defender Commission of Indiana,⁹⁰ for which the legislature has appropriated \$1.3 million during the 1989-91 biennium to assist counties in paying the costs of litigating capital cases.

89. IND. TRIAL R. 58, 72, 77 (1990).

90. IND. CODE ANN. § 33-8-13-1 (West Supp. 1990).

F. Is Anybody Noticing?

When I was sworn in as chief justice, I said: "We want to be a court so well-regarded that judges in other states, when considering the toughest legal issues of our time, will be led to look at each other and ask: 'I wonder what Indiana has done about this?'"⁹¹ This statement was more a declaration about the need to pursue excellence than the need to pursue recognition. Recognition flows naturally to those who perform quality legal and judicial work. Indiana needs courts befitting the high quality of its bar. A strong Indiana judiciary can contribute to a better life for Indiana's citizens and for all Americans,⁹² indeed, for citizens in other lands.⁹³ The country should view Indiana as a place where high caliber lawyers practice and high caliber judges sit. I suggest that there are some signs that this is so.

There was a time when the Indiana Supreme Court stood near the top of the national list of state courts to which lawyers, academics, and other judges looked for answers to the legal problems of the day. It was no accident that when the West Publishing Company created the *Northeastern Reporter* in 1885 it included New York, Massachusetts, Illinois, Ohio, and Indiana. These were states with supreme courts that the profession regarded as top-rate. A study by West Publishing Company in 1912 examined how often state courts cited each other as authority. In the years immediately before 1910, the Indiana Supreme Court was the fifth most commonly cited state supreme court, following only New York, Massachusetts, Illinois, and California.⁹⁴ A similar exercise in 1920 showed Indiana ranked eighth. A study of the relative prestige of state supreme courts in 1936 concluded that Indiana's court ranked fifteenth.⁹⁵

91. Remarks by Randall T. Shepard on assuming the office of Chief Justice of the Indiana Supreme Court, Old Vanderburgh County Courthouse, Mar. 4, 1987.

92. Although Indiana Supreme Court opinions are not binding on other state courts, they can offer guidance based on their persuasiveness, especially when other courts are "confronting novel legal problems or contemplating legal change." G.A. TARR & M. ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 31-32 (1988).

93. In more ways than we can know, the decisions coming from this state affect the lives of all persons controlled by the rule of law. Paula Cooper's death penalty appeal attracted international attention, including a plea for leniency from Pope John Paul II. *Cooper v. State*, 540 N.E.2d 1216, 1217 n.1 (Ind. 1989) (citing newspaper articles discussing the international community's reaction to the *Cooper* case). Communist countries in Europe and elsewhere are now abandoning their old systems of government and are looking to the United States collectively and to individual states for guidance in establishing a new legal order. Our federal colleagues have made a contribution on this front. United States District Court Judge John D. Tinder recently travelled to Yugoslavia to lecture on the United States's attempts to combat drug crimes.

94. *THE DOCKET* 642 (West, Jan. 1912), cited in Mott, *Judicial Influence*, 30 AM. POL. SCI. REV. 295, 307-08 (1936).

95. Mott, *supra* note 94, at 314.

As time passed, our ranking continued to decline. By 1975, a study of the reputation of state supreme courts placed Indiana twenty-fifth.⁹⁶ Only Missouri and Texas had fallen further.⁹⁷ The years immediately preceding Proposition Two reflected this same pattern. It was possible to search Shepard's Indiana Citations and find that virtually all of our opinions were being cited only in the Northeastern Reporter by Indiana courts. We were writing to ourselves.

By the late 1980s, Indiana was very much in the business of saying important things about the law, and attracting national attention. The nation's other state courts once again have been citing the Indiana Supreme Court as authority for their own decisions. A search of WESTLAW reveals that during 1990 we were cited at least 165 times by other state courts,⁹⁸ 15 times by federal circuit courts,⁹⁹ and 2 times by the U.S. Supreme Court.¹⁰⁰ Sixty of the citations by other state courts were to opinions our court issued since the beginning of 1985. Our decision about social host liability, *Gariup Construction Co. v. Foster*,¹⁰¹ was cited by the Supreme Court of West Virginia,¹⁰² which seemed to like it, and by the Arizona Court of Appeals,¹⁰³ which did not. Our case about treating mental patients with psychotropic drugs¹⁰⁴ was cited by the U.S. Supreme Court¹⁰⁵ and noted by the Maryland Court of Appeals.¹⁰⁶ The Illinois Court of Appeals cited our decision in *Covalt v. Carey Canada, Inc.*¹⁰⁷ about the statute of repose in asbestos cases.¹⁰⁸

Many of our recent criminal law decisions have been noted elsewhere. The Supreme Court of Illinois cited our opinion in *Weekly v. State*¹⁰⁹ in resolving a question about the exclusion of potential jurors who were

96. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83, 89 (1983).

97. *Id.* at 92-93.

98. See WESTLAW, Allstates database.

99. See WESTLAW, CTA database.

100. Horton v. California, 110 S. Ct. 2301, 2305 n.3 (1990); Washington v. Harper, 110 S. Ct. 1028, 1055 n.31 (1990) (Stevens, J., concurring in part and dissenting in part).

101. 519 N.E.2d 1224 (Ind. 1988).

102. Overbaugh v. McCutcheon, 396 S.E.2d 153, 156 n.5 (W. Va. 1990).

103. Bruce v. Chas Roberts Air Conditioning, Inc., 801 P.2d 456 (Ariz. Ct. App. 1990).

104. *In re Mental Commitment of M.P.*, 510 N.E.2d 645 (Ind. 1987).

105. Washington v. Harper, 110 S. Ct. 1028, 1055 n.31 (1990) (Stevens, J., concurring in part and dissenting in part).

106. Wilham v. Wilzack, 319 Md. 485, 510 n.9, 573 A.2d 809, 821 n.9 (1990).

107. 543 N.E.2d 382 (Ind. 1989).

108. Olsen v. Owens-Corning Fiberglass Corp., 198 Ill. App. 3d 1039, 1042, 556 N.E.2d 716, 718 (1990).

109. 496 N.E.2d 29 (Ind. 1986).

black.¹¹⁰ The Colorado Court of Appeals followed our decision on post-conviction relief, *White v. State*,¹¹¹ to decide the appropriate remedy for an error in imposing sentence after a guilty plea.¹¹² The South Carolina Supreme Court followed our opinion in *Fox v. State*¹¹³ in deciding whether limited expertise in a witness might permit the witness to express an opinion.¹¹⁴

The court's rising prominence is also reflected in the fact that several of our cases have been noted by legal commentators. *Department of Natural Resources v. Indiana Coal Council, Inc.*¹¹⁵ received immediate and wide circulation by national historic preservation organizations, which predicted that other states would use its analysis, and which called the opinion a major takings case of national importance.¹¹⁶ *Stropes v. Heritage House Childrens Center*¹¹⁷ was the subject of the lead column in a national trial lawyers magazine. The author called *Stropes* an "enlightened and well-reasoned opinion."¹¹⁸ One month later, the same magazine analyzed *Koske v. Townsend Engineering Co.*,¹¹⁹ and applauded the decision as an "exemplary opinion of corrective justice."¹²⁰ *Travel Craft, Inc. v. Wilhelm Mende GmbH & Co.*,¹²¹ a case of first impression about disclaimer of warranties, was summarized in the judicial highlights section of the advance sheets of most of the regional and national reporters published by the West Publishing Company.¹²² *Farrow v.*

110. *People v. Hope*, 137 Ill. 2d 430, 457, 560 N.E.2d 849, 861 (1990).

111. 497 N.E.2d 893 (Ind. 1986).

112. *People v. Sandoval*, 1990 WL 162360 (Colo. Ct. App. 1990).

113. 506 N.E.2d 1090 (Ind. 1987).

114. *State v. Myers*, 391 S.E.2d 551, 554 (S.C. 1990) ("authority exists to guide us on this precise question").

115. 542 N.E.2d 1000 (Ind. 1989), *cert. denied*, 110 S. Ct. 1130 (1990).

116. The opinion was featured on the cover page of the National Trust's Preservation Law Reporter advance sheet for September 1989. The Reporter noted that the case would "provide other states and local jurisdictions with a useful framework for upholding other measures designed to protect historic and archaeological sites." The National Center for Preservation Law called it a "major 'taking' case" of "national importance." 37 PRESERVATION LAW UPDATE 1 (Sept. 4, 1989).

117. 547 N.E.2d 244 (Ind. 1989) (focusing on the liability of children's center for damages inflicted on severely retarded boy who was living at the center at the time he was sexually abused by an employee).

118. *Lambert, Tom on Torts*, 33 L. REP. 140, 142 (1990). The opinion was also summarized in a commercial reporter that tracks cases of national significance to the medical community. 12 MED. LIABILITY REP. 108 (May 1990).

119. 551 N.E.2d 437 (Ind. 1990) (defense of open and obvious danger does not survive codification of strict liability).

120. *Lambert, Tom on Torts*, 33 L. REP. 188 (1990).

121. 552 N.E.2d 443 (Ind. 1990).

122. See, e.g., 789 P.2d XVI (West Supp. June 1, 1990); 733 F. Supp. VII (West Supp. June 4, 1990); 552 N.E.2d XXII (West Supp. May 30, 1990).

Fairrow,¹²³ a case that held that the question of paternity might be reopened upon accidental discovery of sickle cell trait, was featured in a recent issue of the *National Law Journal*,¹²⁴ and it was included on the front page as a highlighted case in BNA's *Family Law Reporter*.¹²⁵ The court's disciplinary opinion in *Matter of Kern*¹²⁶ became the subject of a column about ethics on the op-ed page of the *National Law Journal*.¹²⁷ Our opinion on judicial discipline, *In re Boles*,¹²⁸ was included in a casebook of the American Judicature Society.¹²⁹

As the court's writings have attracted wider notice, its members have been in greater demand. During the last two years, law schools from California to Connecticut have asked members of the Indiana Supreme Court to sit on moot court panels.¹³⁰ One member of the court was asked to chair a national panel examining the use of videotape as a record-keeping tool.¹³¹ Another member of the court was asked to sit as a judge in a national individual achievement competition.¹³² The Federal Circuit Bar Association asked one justice to speak at a conference on takings, held in Virginia.¹³³

A court writing more law and playing a more prominent role in the law finds it easier to recruit good talent. In the early 1980s, the court generally recruited its law clerks from two law schools. In 1990, the court's eleven clerks came from a greater variety of places, including Indiana University-Bloomington (4), Indiana University-Indianapolis (3), Yale (2), Northwestern (1), and Valparaiso (1). Six of our current clerks served on the law journals of those schools, including the editor-in-chief of the *Indiana Law Journal* and the managing editor of the *Yale Law Journal*. That bright, capable young lawyers want to begin their careers

123. 559 N.E.2d 597 (Ind. 1990).

124. Sept. 24, 1990, at 6, col. 2.

125. 16 Fam. L. Rep. (BNA) 1557, 1563 (Oct. 9, 1990).

126. 555 N.E.2d 479 (Ind. 1990).

127. *Ethics: Indiana Court Backs Up Sanctions*, Nat'l Law J., Oct. 22, 1990, at 13, col. 3.

128. 555 N.E.2d 1284 (Ind. 1990).

129. AMERICAN JUDICATURE SOCIETY, 12TH NATIONAL CONFERENCE FOR JUDICIAL CONDUCT ORGANIZATIONS 158 (1990).

130. These include the University of the Pacific, Yale, University of Cincinnati, John Marshall, and Southern Illinois.

131. The National Center for State Courts asked this author to chair an advisory committee overseeing a study, the results of which were published in book form. NATIONAL CENTER FOR STATE COURTS, VIDEOTAPED TRIAL RECORDS: EVALUATION AND GUIDE (1990).

132. Last June, Justice Brent Dickson served on the 1990 National Awards Jury at the request of the Freedoms Foundation at Valley Forge.

133. The Federal Circuit Bar Association, the United States Claims Court Bar Association, and the National Trust for Historic Preservation asked this author to speak at The Takings Clause Bicentennial, a conference held at Woodberry Forest and Montpelier Station, Virginia, in June 1990.

with the Indiana Supreme Court is very heart-warming. It is also a good sign.

III. LOOKING AT THE FUTURE

The progress I have described suggests that the 1990s can be a strong chapter in the history of the Indiana Supreme Court. A docket balanced with both civil and criminal cases, and more active leadership of the judiciary and the profession, are just a beginning.

As for our appellate work, I see at least two tasks in the decade ahead — one fairly subtle and one quite public. First, we justices must develop more refined ways of selecting cases to decide on the merits from among the eight or nine hundred requests presented to us each year. We now do this with the assistance of staff counsel and through our own face-to-face discussions of hundreds of cases a year. Still, we decide which appeals to take largely on a case-by-case basis, without reference to the whole of the demand on our time. We must create some new protocol for allocating our docket. Such improvements in our internal operation will go nearly unnoticed, but more systematic selection of cases will benefit one and all.

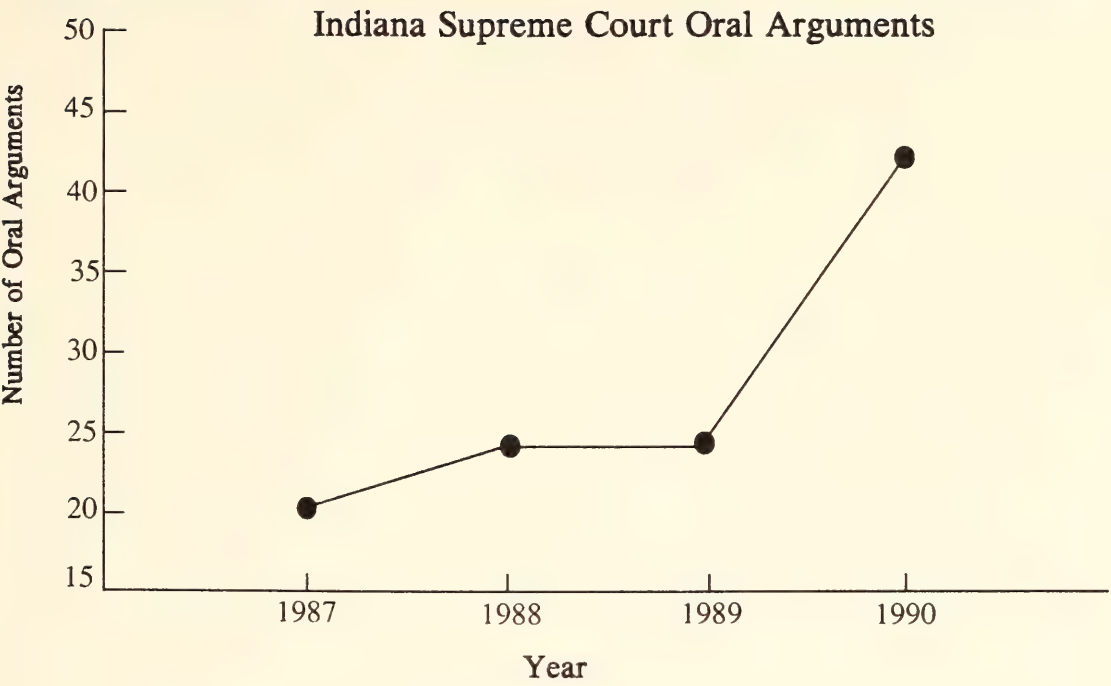
Second, we must pay greater attention to the caliber of the jurisprudence that our opinions represent. In years when we wrote 3-400 opinions, there was little time for tending to the analytical framework or the turns of phrase that so often set the course for future development of the law. We will now write only 100 or 150 opinions per year. Under these circumstances, pride of craftsmanship and duty to the bar and the public will command better thinking and greater attention to detail. I want a court better respected for its writing, in both the academy and the bar.

We must also give further leadership to the cause of trial court reform. We should begin asking questions that might have seemed too ambitious in even the recent past, such as what we can do to improve the professional working conditions of our trial judges.

We must also improve our record of recruiting women and minorities to the Indiana judiciary. While the number of women and minority judges has doubled in the last decade, all of us should recognize that there are still far too many barriers to equal opportunity. It should be our common project to make the judiciary (and the profession) more inclusive.

Courts are the most visible symbols of the role our profession plays in the lives of the people whom we serve as lawyers and judges. I am determined that the Indiana Supreme Court will be a place befitting our profession's highest aspirations, and I am optimistic that it can be.

Appendix



Administrative Law: When Agencies Don't Play By the Rules

JEFFREY D. CLAFLIN*
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PETER M. RACHER***

I. INTRODUCTION

Complex societies require a legal system capable of and dedicated to handling highly specialized legal functions. For this reason, federal and state legislatures have created a multitude of administrative agencies, each to regulate specific activities and each vested with a variety of executive, legislative, and judicial powers. Administrative agencies issue permits, grant variances, conduct investigations, subpoena records, determine eligibility for special benefits, impose fines, and in innumerable other ways affect peoples' lives. As a result of the enormous breadth of their regulatory authority, administrative agencies have tremendous potential to advance the public good. But when an agency's action is improperly motivated or unconstitutional, the traditional processes of administrative appeal and judicial review may not provide an effective remedy for the party injured by the agency or the agency's employees. In those instances, a variety of extra-administrative actions may be available to the aggrieved party. These actions include, for example, the filing of an action under the Indiana Tort Claims Act,¹ a section 1983 action, an action for a taking without just compensation, or an action for mandate.²

During the survey period,³ the Indiana Supreme Court and the Indiana appellate courts handed down a number of decisions directly affecting the availability of extra-administrative remedies. In the wake of the Indiana Supreme Court's 1988 decision in *Peavler v. Board of Commissioners of Monroe County*,⁴ the majority of these cases concerned

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** Associate, Plews & Shadley, Indianapolis. J.D., Whittier College School of Law, 1987.

*** Associate, Plews & Shadley, Indianapolis. J.D., Indiana University School of Law-Bloomington, 1986.

1. IND. CODE §§ 34-4-16.5-1 to -21 (1988).

2. This is not an exclusive list of extra-administrative remedies. This list only covers extra-administrative remedies acted on during the survey period.

3. The survey period is January 1, 1989 through November 30, 1990.

4. 528 N.E.2d 40 (Ind. 1988).

tort actions filed by an individual against the state, its agencies, or political subdivisions. But the courts also reconsidered regulatory takings, inverse condemnation, and actions for mandate. This Article will examine some of the important decisions in each of these areas.

II. THE TRADITIONAL REMEDY

Under Indiana's Administrative Orders and Procedures Act (AOPA), Indiana Code section 4-21.5, the legislature has codified a traditional administrative remedy available to the party adversely affected by an agency action. The AOPA controls the bulk of administrative practice in Indiana. However, Indiana Code section 4-21.5-2-4 makes the Act inapplicable to certain *agencies*.⁵ In addition, Indiana Code section 4-21.5-2-5 exempts certain agency *actions* from AOPA procedures.⁶ The AOPA provides that individuals who are adversely affected by an agency action may seek review of that action before an administrative law judge (ALJ). The review is in the form of an adjudicatory hearing.⁷ At the hearing's conclusion, the ALJ prepares findings of fact, conclusions of law, and the recommended order for submission to the ultimate authority

5. IND. CODE § 4-21.5-2-4 (1988 & Supp. 1990): This Article does not apply to any of the following agencies:

- (1) The governor.
- (2) The state board of accounts.
- (3) The state educational institutions (as defined by IC 20-12-0.5-1(b)).
- (4) The department of employment and training service.
- (5) The employment insurance service board of the department of employment and training services.
- (6) The workers' compensation board.
- (7) The military officers or boards.
- (8) The utility regulatory commission.
- (9) The department of state revenue (excluding an agency action related to the licensure of private employment agencies).
- (10) The state board of tax commissioners.

These agencies generally have promulgated their own hearing procedures that, although different from the AOPA in many respects, are nonetheless subject to judicial review and the extra-administrative remedies discussed in this Article. *See, e.g.*, IND. ADMIN. CODE tit. 170, r. 1-1-1 to -22 (1988) (the administrative procedure observed by the Indiana Utility Regulatory Commission).

6. IND. CODE § 4-21.5-2-5 (1988 & Supp. 1990) lists 13 agency actions that are exempt from AOPA procedure. Subsection (5) is particularly relevant: The act does not apply to "[a] resolution, directive, or other action of any agency that relates solely to the internal policy, organization, or procedure of that agency or another agency and is not a licensing or enforcement action . . ." *Id.*

7. IND. CODE §§ 4-21.5-3-25 to -26 (1988) govern the conduct of administrative hearings.

for the agency.⁸ In Indiana, the ultimate authority can be an individual or a panel of individuals vested by law or executive order with final authority.⁹ The ultimate authority will consider the ALJ's recommendation and decide whether it should affirm, modify, or dissolve the ALJ's "order."¹⁰ When the ultimate authority issues a final order, that order can then be appealed in the circuit or superior courts of Indiana.¹¹

Indiana courts recognize the general rule that a party must "exhaust" all administrative remedies before pursuing an appeal in court.¹² In addition, the AOPA provides that failure to exhaust administrative remedies will result in the waiver of the party's right to judicial review.¹³ The intent of this general rule is to discourage the courts' interference in an agency's performance of special functions given to it by the legislature, to encourage finality in decision making, to maintain an orderly judicial process, to avoid multiplicity of suits, to afford the parties and the courts the benefit of an agency's experience and expertise, and to economize judicial resources.¹⁴ There are, however, well recognized exceptions to the general rule that administrative remedies must be exhausted.¹⁵

A party can avoid the doctrine of exhaustion when (1) the administrative action raises significant constitutional issues; (2) the plaintiff can demonstrate that administrative review would be futile; (3) the applicable administrative procedural statute is void; or (4) the plaintiff would suffer irreparable harm if compelled to exhaust administrative remedies.¹⁶ In addition, other types of administrative "actions" simply

8. *Id.* § 4-21.5-3-27.

9. *Id.* § 4-21.5-1-15. *See also Id.* § 4-21.5-3-28(b), which provides that "[t]he ultimate authority or its designee shall conduct proceedings to issue a final order."

10. *Id.* § 4-21.5-3-29(b).

11. *Id.* §§ 4-21.5-5-1 to -16.

12. *See, e.g.,* East Chicago v. Sinclair Refining Co., 232 Ind. 295, 111 N.E.2d 459 (1953); Marion Trucking Co. v. McDaniel Freight Lines, Inc., 231 Ind. 514, 108 N.E.2d 884 (1952); Evansville City Couch Lines, Inc. v. Rawlings, 229 Ind. 552, 99 N.E.2d 597 (1951).

13. IND. CODE § 4-21.5-5-4 (1988).

14. *See generally* Uniroyal, Inc. v. Marshall, 579 F.2d 1060, 1064 (7th Cir. 1978); Indiana State Bldg. & Constr. Trades Council v. Warsaw Community School Corp., 493 N.E.2d 800, 805-06 (Ind. Ct. App. 1986).

15. In addition to the exceptions established by common law, IND. CODE § 4-21.5-5-2(c) (1988) specifically provides that a "person is entitled to judicial review of a non-final agency action only if the person establishes both . . . [i]mmediate and irreparable harm . . . [and] [n]o adequate remedy exists at law."

16. *See, e.g.,* Greene v. Meese, 875 F.2d 639 (7th Cir. 1989) (civil rights plaintiff is normally not required to exhaust administrative remedies); Consolidated Rail Corp. v. Smith, 664 F. Supp 1228 (N.D. Ind. 1987) (court need not await conclusion of administrative review of controversy that can only be resolved by determination of the constitutionality

do not fit into the traditional scheme of administrative review. For example, when an agency does not act on a matter and the applicable statute provides no time period during which the agency must act, is the party dealing with the agency simply obligated to wait? If not, what degree of "inactivity" will trigger administrative review?¹⁷ Further, the administrative forum seems particularly unsuited for reviewing the malfeasance or misfeasance of agency officials. In these contexts, counsel may wish to consider an extra-administrative remedy such as the filing of an action under the Indiana Tort Claims Act (ITCA).¹⁸

III. TORT CLAIMS AGAINST THE STATE

A. Introduction

Traditionally, recovery against the state in tort has been severely limited by the ancient doctrine of sovereign immunity.¹⁹ The English common law held that "the king could do no wrong," and therefore the sovereign was immune to actions in court.²⁰ This doctrine of sovereign immunity was adopted in the United States after the American Revolution, primarily as a means to protect the limited financial resources of the fledgling republic and its independent states.²¹ Since that time, however, the doctrine has eroded. In most jurisdictions, with limited exceptions,²² states no longer enjoy the broad immunity originally granted

of a statute or ordinance if the agency lacks the power to adjudicate the constitutional claim); *Jones v. Blinziner*, 536 F. Supp. 1181 (N.D. Ind. 1982) (when the administrative remedy is futile, exhaustion will not be required); *Bartholomew County Beverage Co. v. Barco Beverage Corp.*, 524 N.E.2d 353 (Ind. Ct. App. 1988) (doctrine of exhaustion does not apply when the administrative remedy is impossible or fruitless and of no value under the circumstances); *New Trend Beauty School, Inc. v. Indiana State Bd. of Beauty Culturist Examiners*, 518 N.E.2d 1101 (Ind. Ct. App. 1988). *See also* IND. CODE § 4-21.5-5-2(c) (judicial review on nonfinal agency actions).

17. *See* IND. CODE § 4-21.5-1-4 (1988), which defines agency action as "[a]n agency's performance of, or failure to perform, any other duty, function, or activity under this article." *Id.* (emphasis added). This provision of the AOPA appears to provide an administrative alternative to the action for mandate. However, as of this writing, the authors are not aware of any reported instances when this provision has been used to redress agency inaction.

18. IND. CODE §§ 34-4-16.5-1 to -21 (1988).

19. The doctrine of sovereign immunity also traditionally covered employees of the state acting within the scope of their employment.

20. *See, e.g., Campbell v. State*, 254 Ind. 55, 57, 284 N.E.2d 733, 734 (1972).

21. *See generally Campbell v. State*, 254 Ind. 55, 284 N.E.2d 733 (1972) (discussion of sovereign immunity).

22. *See Kellogg v. City of Gary*, 562 N.E.2d 685, 703 (Ind. 1990) (a qualified immunity is preserved for judges and, to a lesser extent, for nonjudicial public officers in their discretionary policy-making acts).

by the common law, but instead rely upon a limited immunity preserved by statute. Such is the case in Indiana. The legislature has "preserved" a limited degree of governmental immunity in the ITCA.²³

In 1972, the Indiana Supreme Court decided in *Campbell v. State*²⁴ that there was no longer any basis "for the continuation of the doctrine of sovereign immunity" under the common law and that "[t]he proper forum" for determining whether any immunity should survive is "in the legislature."²⁵ The *Campbell* decision held that the state in most cases would no longer enjoy immunity from tort actions unless and until the state legislature established such immunity by statute.²⁶ Two years later, the legislature passed the ITCA.²⁷

Central to the present version of the ITCA is a list of seventeen situations, occurrences, actions, or inactions for which the state, its agencies, political subdivisions,²⁸ or employees²⁹ shall not be liable in tort.³⁰ Of the seventeen "immunities," most are very specific or limited in scope. For example, the state shall not be liable for a loss that results from the "adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations),"³¹ the "natural condition of unimproved property,"³² the "temporary condition of a public thoroughfare which results from weather,"³³ the "initiation of a judicial or administrative proceeding,"³⁴ or "misrepresentation if unintentional."³⁵ Although the ITCA is rather specific, at least one Indiana court has held that the list of immune acts enumerated in the ITCA is not exclusive.³⁶

23. IND. CODE § 34-4-16.5-1 to -21 (1988).

24. 259 Ind. 55, 284 N.E.2d 733 (1972).

25. *Id.* at 62-63, 284 N.E.2d at 737.

26. *Id.*

27. 1974 Ind. Acts 142.

28. IND. CODE § 34-4-16.5-2 (1988) defines "political subdivision" to include counties, townships, cities, towns, separate municipal corporations, special taxing districts, state colleges or universities, city or county hospitals, school corporations, boards, or commissions of any of the foregoing entities.

29. ITCA as it relates to employees only pertains to employees acting within the scope of their employment. *Id.*

30. *Id.* § 34-4-16.5-3.

31. *Id.* § 34-4-16.5-3(7).

32. *Id.* § 34-4-16.5-3(1).

33. *Id.* § 34-4-16.5-3(3).

34. *Id.* § 34-4-16.5-3(5).

35. *Id.* § 34-4-16.5-3(13).

36. *Coghill v. Badger*, 418 N.E.2d 1201, 1211 (Ind. Ct. App. 1981). However, arguably, *Coghill* should be limited to holding only that the notice-of-claim provisions of the ITCA are applicable to all tort actions regardless of whether the state is actually immune from liability arising from the specific tort.

The legislature preserved a general kind of immunity by providing that the state shall not be liable if a loss results from "[t]he performance of a discretionary function."³⁷ By its inclusion of the "discretionary function" provision in the ITCA, the legislature apparently codified the traditional analysis that had been used as the basis for granting the state immunity in Indiana since the early 1900s.

In 1919, the Indiana Appellate Court used a "discretionary/ministerial" analysis to determine whether the state would be liable in tort. The court in *Adams v. Schneider*³⁸ held:

A duty is discretionary when it involves on the part of the officer to determine whether or not he should perform a certain act, and, if so, in what particular way, and in the absence of corrupt motives in the exercise of such discretion he is not liable. His duties, however, in the performance of the act, after he has once determined that it shall be done, are ministerial, and for negligence in such performance, which results in injury, he may be liable in damages.³⁹

Except in those rare instances when the actor, the individual employee, exercised absolutely no judgment in the performance of the act, the *Adams* analysis of governmental liability effectively shielded the state from tort actions for several decades.⁴⁰

In 1988, however, the Indiana Supreme Court finally rejected the "discretionary/ministerial" analysis in *Peavler v. Board of Commissioners of Monroe County*.⁴¹ *Peavler* marked a turning point in Indiana tort claims jurisprudence, and provides the backdrop against which more recent tort actions against the state must be viewed.

In *Peavler*, the court decided whether a county could be held liable for its allegedly negligent failure to erect warning signs on a particular portion of road.⁴² The county argued that its failure to erect the signs was protected under the "discretionary act" immunity granted by the

37. IND. CODE § 34-4-16.5-3(6) (1988).

38. 71 Ind. App. 249, 124 N.E. 718 (1919).

39. *Id.* at 255-56, 124 N.E. at 720 (citing *Bates v. Horner*, 65 Vt. 471, 27 A. 134 (1893)).

40. See generally *Rodman v. Wabash*, 497 N.E.2d 234 (Ind. Ct. App. 1986); *Coghill v. Badger*, 418 N.E.2d 1201 (Ind. Ct. App. 1981). But see *Mills v. American Playground Device Co.*, 405 N.E.2d 621 (Ind. Ct. App. 1980) (court held that negligent installation of playground equipment was a ministerial act not entitled to immunity).

41. 528 N.E.2d 40 (Ind. 1988).

42. The court took this case on transfer to resolve a conflict between two divisions of the court of appeals: *Peavler v. Board of Commr's of Monroe County*, 492 N.E.2d 1086 (Ind. Ct. App. 1986), and *Hout v. Board of Commr's of the County of Steuben*, 497 N.E.2d 597 (Ind. Ct. App. 1986).

ITCA.⁴³ The Indiana Supreme Court, however, determined that “[d]iscretionary immunity must be narrowly construed because it is an exception to the general rule of liability.”⁴⁴ The court then replaced the traditional discretionary/ministerial analysis with a “planning/operational” test as the basis for determining whether an action of the state is discretionary.⁴⁵

The planning/operational analysis that the court borrowed from federal case law⁴⁶ limits the grant of discretionary act immunity to “[p]lanning activities [which] include acts or omissions in the exercise of a legislative, judicial, executive or planning function which involves formulation of basic policy decisions characterized by official judgment or discretion in weighing alternatives and choosing public policy.”⁴⁷ Further, the court held:

The discretionary function exception insulates only those significant policy and political decisions which cannot be assessed by customary tort standards. In this sense, the word discretionary does not mean mere judgment or discernment. Rather, it refers to the exercise of political power which is held accountable only to the Constitution or the political process.⁴⁸

The court held that immunity will be afforded only upon an affirmative showing by the governmental entity that the “challenged decision was discretionary because it resulted from a policy oriented decision-making process.”⁴⁹ In other words, the governmental entity must be able to show that it engaged in a conscious “balancing of risks and benefits,” resulting in the making of a policy decision.⁵⁰

43. *Peavler*, 528 N.E.2d at 42.

44. *Id.* at 46 (citing *Larson v. Indiana School Dist. No. 314*, 289 N.W.2d 112, 121 (Minn. 1979)).

45. *Id.*

46. *See generally* *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978).

47. *Peavler*, 528 N.E.2d at 45 (citing *Marreck v. Cleveland Metroparks Bd. of Commr's*, 9 Ohio St. 3rd 194, 459 N.E.2d 873 (1984)).

48. *Id.* (citing *Miller v. United States*, 583 F.2d 857, 866-67 (6th Cir. 1978)).

49. *Id.* at 47.

50. *Id.* *See also* *Cromer v. City of Indianapolis*, 540 N.E.2d 663 (Ind. Ct. App. 1989). In *Cromer*, the plaintiff brought a wrongful death action against the City of Indianapolis, alleging that her husband's death was caused by the City's failure to set a proper speed limit, failure to redesign the highway on which the accident occurred, and failure to place appropriate warning signs along the highway. Reversing the trial court's summary judgment in favor of the City, the court of appeals held — on the issue of the warning signs — that the city “ha[d] not consciously balanced the risks and benefits to arrive at a decision not to place warning signs” *Id.* at 666. *Cf.* *Mullen v. City of Mishawaka*, 531 N.E.2d 229 (Ind. Ct. App. 1988).

The *Peavler* court offered a list of factors which, under the planning/operational analysis, would indicate immunity:

1. The nature of the conduct —
 - a) Whether the conduct has a regulatory objective;
 - b) Whether the conduct involved the balancing of factors without reliance on a readily ascertainable rule or standard;
 - c) Whether the conduct requires a judgment based on policy decisions;
 - d) Whether the decision involved adopting general principles or only applying them;
 - e) Whether the conduct involved establishment of plans, specifications and schedule; and
 - f) Whether the decision involved assessing priorities, weighing of budgetary considerations or allocation of resources.
2. The effect on governmental operations —
 - a) Whether the decision affects the feasibility or practicability of a government program; and
 - b) Whether liability will affect the effective administration of the function in question.
3. The capacity of the court to evaluate the propriety of the government's action — Whether tort standards offer an insufficient evaluation of the plaintiff's claims.⁵¹

Justice Pivarnik, in his dissent, stated that "[t]he affect [sic] of the holding of the majority [in *Peavler*] is to virtually wipe out all governmental immunity"⁵² A review of the cases decided since *Peavler*, however, suggests that Justice Pivarnik's prediction was somewhat overstated. At best, Indiana's post*Peavler* decisions offer a "mixed bag" of opportunities and pitfalls for the potential plaintiff.

The several Indiana Supreme Court cases that have considered the ITCA since *Peavler*⁵³ have dealt primarily with the notice provisions of

51. *Peavler*, 528 N.E.2d at 46.

52. *Id.* at 51.

53. One of these cases, *Indiana State Highway Comm'n v. Morris*, 528 N.E.2d 468 (1988), was decided prior to the survey period. In *Morris*, the plaintiff — who had been seriously injured in an auto accident on a one lane state highway bridge — filed an action against the state "alleging negligence in construction, maintenance and traffic engineering of the bridge." *Id.* at 469-70.

Within the 180 days prescribed by statute, the plaintiff served notice of her complaint with the Indiana State Highway Commission, but she did not serve notice of her complaint upon the state's Attorney General. However, an employee at the Highway Commission

the Act.⁵⁴ One case dealt with section 1983.⁵⁵ The Indiana appellate courts, however, have provided the majority of the decisions directly addressing the issues raised by *Peavler*.⁵⁶

*B. The Relationship Between Policy-making
and ITCA Discretionary Act Immunity*

In 1989, the Court of Appeals for the First District had occasion to apply the *Peavler* analysis. In *City of Seymour v. Onyx Paving Co.*,⁵⁷ Onyx met with the Building Commissioner of the city of Seymour to inquire into zoning classifications concerning a piece of property Onyx wanted to buy. Onyx intended to build a bituminous asphalt batch plant on the site. The Building Commissioner consulted the zoning code and informed Onyx that the plant could be built on the site selected by Onyx. Relying on the Commissioner's word, Onyx bought the property and obtained an Improvement Location Permit from the Commissioner. Onyx acquired other necessary permits and began construction of the plant.

made a copy of the notice and forwarded it to the Attorney General's office pursuant to standard operating procedures at the Commission. That copy was received in the Attorney General's office within the 180-day notice period.

Vacating the court of appeals decision, the Indiana Supreme Court held that the notice provision of the Tort Claims Act had been substantially complied with even though the plaintiff had not actually sent notice to the Attorney General. *Id.* at 470. The court reasoned that the "language of the statute, literally applied, simply requires that the tort claim notice be filed with the Attorney General and the state agency. It does not designate who must file the notice." *Id.* Consequently, the fact that the Highway Commission employee sent a copy of the notice to the Attorney General's office within the 180-day period allowed by statute was sufficient for the court to find that the plaintiff had substantially complied with the Act's notice requirements. *Id.* at 470-71.

Another of the five cases determined since *Peavler* is *Boger v. Lake County Commr's*, 547 N.E.2d 257 (Ind. 1989) (Indiana Supreme Court remanded a summary judgment in favor of the government).

54. IND. CODE § 34-4-16.5-7 (1988) concerns the notice requirements for claims against political subdivisions; IND. CODE § 34-4-16.5-8 (1988) concerns the notice requirement to be given by incapacitated plaintiffs; IND. CODE § 34-4-16.5-9 (1988) concerns the form of statement of the notice requirement; and IND. CODE § 34-4-16.5-11 (1988) deals with service of the notice.

55. *Werblo v. Hamilton Heights School Corp.*, 537 N.E.2d 499 (Ind. 1989).

56. In addition to those cases discussed in detail below, see *Huntley v. City of Gary*, 550 N.E.2d 790 (Ind. Ct. App. 1990) and *Borne v. N.W. Allen County School Corp.*, 532 N.E.2d 1196 (Ind. Ct. App. 1989). In *Huntley*, the court held that under the planning/operational test announced in *Peavler*, an ambulance driver's exercise of professional judgment in driving through an intersection did not rise to the level of a policy-making decision and was not therefore protected by ITCA immunity. *Huntley*, 550 N.E.2d at 792. In *Borne*, the court held that under the planning/operational test, a teacher's exercise of professional judgment in allowing students to use a public restroom, unchaperoned, did not rise to the level of a policy decision. *Borne*, 532 N.E.2d at 1200-01.

57. 541 N.E.2d 951 (Ind. Ct. App. 1989).

During construction, the Commissioner issued a stop work order at the site pursuant to the mayor's direction. Onyx complied with the order. The Commissioner, the mayor, and the city attorney requested that Onyx provide proof of exemption from the State Building Commission, and requested that Onyx provide a better site plan. Onyx provided the requested information. The city then requested Onyx to obtain a Special Exception Permit.⁵⁸

At that point, Onyx filed suit in the Jackson Circuit Court and requested injunctive relief and damages. Concurrently, Onyx filed an appeal with the Seymour Board of Zoning Appeals which was denied. Onyx then filed a notice of tort claim with the city which was never honored or denied. The trial court found in favor of Onyx.⁵⁹ It granted Onyx's request for an injunction, and denied the city's request for injunctive relief.⁶⁰

On appeal, the city asserted that its act of issuing the stop work order was immune from suit by virtue of the protection afforded under the ITCA. Principally, the city relied upon Indiana Code section 34-4-16.5-3(6), which immunizes a governmental entity or employee acting within the scope of employment if the loss results from the performance of a discretionary function.⁶¹ The court of appeals reversed and remanded the trial court's decision.⁶²

In its discretionary function analysis, the court acknowledged *Peavler* and the planning/operational test as a means of determining whether conduct is entitled to discretionary act immunity.⁶³ The court of appeals determined that the appropriate post-*Peavler* analysis required an "inquiry into the nature of the governmental act and the decision making process involved. It is not enough to merely inquire as to whether judgment was exercised, but rather one must inquire as to whether the *judgment* calls for policy considerations."⁶⁴

58. The Special Exception Permit was requested because the city believed that the asphalt batch plant could manufacture tar or tar products or engage in the process of oil processing, refining, and manufacturing.

59. The jury awarded Onyx damages in the amount of \$121,600, in addition to injunctive relief. *Onyx*, 541 N.E.2d at 953.

60. *Id.*

61. Seymour also pleaded immunity under three other sections of the ITCA: IND. CODE § 34-4-16.5-3(7) (1988), concerning the adoption and enforcement of a law; IND. CODE § 34-4-16.5-3(10) (1988), concerning the issuance, denial, or revocation of a permit; and IND. CODE § 34-16.5-3(11) (1988), concerning the failure of the government to inspect property to determine whether the property is in compliance with the law. *Id.* at 956. The court held that Seymour was entitled to immunity under each of these other sections as well as under section 6 providing for discretionary immunity. *Id.* at 957-58. This Article discusses only the court's discretionary immunity analysis.

62. *Id.* at 959.

63. *Id.* at 956-58.

64. *Id.* at 957 (emphasis added).

Under the court's preliminary analysis, very few government actions would seem to be protected by tort claims immunity by virtue of their discretionary nature. Only actions arising to government policy-making would be protected. Nevertheless, the *Onyx* court concluded in purportedly applying the planning/operational test of *Peavler* that the city was immune from damage claims arising from the issuance of its stop work order.⁶⁵ The court held that the city's goal in issuing the stop work order was to enforce a regulation, and the decision whether to issue the order was a "judgment based upon policy decisions."⁶⁶

The [building commissioner's] decision also involved the balancing of several factors without the opportunity to rely on a readily ascertainable rule or standard. . . . Moreover, the imposition of liability would certainly affect the building commissioner's ability to effectively enforce the zoning code. Finally, the traditional tort standards of reasonableness do not provide an adequate basis for evaluating the act challenged here.⁶⁷

Thus, the court of appeals found the existence of several *Peavler* "factors" that the supreme court stated could, "under most circumstances, point to immunity."⁶⁸

The court of appeals, however, appears to have treated the presence of those factors as dispositive in determining whether the stop work order was the type of policy-making function intended to be protected from tort claims. The essential step in *Peavler*'s planning/operational test is finding whether the discretionary act rises to the level of "the essence of governing,"⁶⁹ and whether the act "involves formulations of basic policy decisions."⁷⁰ In zoning cases such as *Onyx*, the only act that would rise to that policy-making level would be the city's initial creation of zoning districts. The issuance of the stop-work order was purely operational. Seymour was attempting to stop the siting of *Onyx*'s facility, claiming the possible violation of an *existing* city zoning ordinance. Because the city could not demonstrate that it had entered into a deliberative policy-making process in issuing the stop work order, the wrongful issuance of the order should not have been protected by the ITCA's discretionary act immunity. The mere presence of one or even several of the *Peavler* factors does not dispense with the need for a

65. *Id.*

66. *Id.*

67. *Id.*

68. *Peavler*, 528 N.E.2d at 46.

69. *Id.* at 45.

70. *Id.*

court to take the additional step of determining whether the governmental entity actually engaged in *policy-making* in the performance of the objectionable act.⁷¹

C. Immunity Arising from the Enforcement of Law

The Indiana Court of Appeals for the Third District decided *Van Keppel v. County of Jasper*,⁷² which interpreted Indiana Code section 34-4-16.5-3(7).⁷³ Van Keppel owned a farm in Jasper County. Two drainage ditches controlled by the Jasper County Drainage Board were located on his property. Prior to 1985, Van Keppel made improvements to this water control system without approval of the Board. Later, the Board determined the drainage ditches were not properly functioning, and the Board ordered Van Keppel to return them to their original condition. Van Keppel failed to follow the order. The Board hired a contractor to complete the work.

After the work was completed, Van Keppel filed a complaint in the Jasper County Circuit Court against the Board and the contractor, alleging that the contractor, under direction of the Board, negligently removed and destroyed his property.⁷⁴ Van Keppel also alleged an improper taking of his property.⁷⁵ The trial court dismissed all governmental entities from the case based on governmental immunity.⁷⁶

71. *Onyx* raises other questions about the *Peavler* analysis. For example, in *Peavler*, the Indiana Supreme Court arguably listed only three "factors" to be considered when determining whether ITCA immunity should be permitted: the nature of the conduct, the effect on governmental operations, and the capacity of the court to evaluate the propriety of the government's action — "[w]hether tort standards offer an insufficient evaluation of the plaintiff's claims." *Peavler*, 528 N.E.2d at 46. Under the first two factors, the court listed several subfactors linked together with a conjunctive "and." The *Onyx* court relied on several, but not all, of the subfactors listed by the court under the first factor. Should the court have been required to demonstrate the existence of each subfactor because of the conjunction? Further, what exactly is the relationship between the three main factors? Will the existence of any one factor be sufficient to find immunity or must a court find that all three factors are present? The answer to these questions is probably that the factors were not intended by the Indiana Supreme Court to be talismanic. But if the courts are permitted to rely on the *Peavler* factors without making the essential "policy-making" analysis, such questions will become quite important.

72. 556 N.E.2d 333 (Ind. Ct. App. 1990).

73. A governmental entity or an employee acting within the scope of his employment is not liable if a loss results from "[t]he adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment" IND. CODE § 34-4-16.5-3(7) (1988).

74. *Van Keppel*, 556 N.E.2d at 335.

75. *Id.*

76. *Id.*

Van Keppel admitted on appeal that the Board was empowered to order the ditches to be reconstructed.⁷⁷ However, he argued that immunity did not exist because the order and contract were carried out under the control of the County Surveyor. In essence, Van Keppel argued that although the Surveyor is immune from the decision to enforce the Drainage Code, the Surveyor is not immune from the losses resulting from the implementation of the decision.⁷⁸

The court of appeals noted that there is no distinction between deciding to enforce a law and implementing that decision.⁷⁹ The court found the losses occurred during the decision's implementation, and therefore immunity may have existed.⁸⁰ However, the Indiana Drainage Code required the Surveyor, "*to the extent possible, [to] use due care to avoid damage to crops . . . outside of [the county's] right-of-way.*"⁸¹ Ultimately, the court reversed the trial court's decision because the appellant had succeeded in raising an issue of fact concerning whether the Surveyor exercised "due care" in the performance of his duty.⁸²

Van Keppel is interesting because the court of appeals recognized that "due care," or rather the lack of due care, would be sufficient to remove a governmental act from the shield of immunity provided by the ITCA.⁸³ Although *Van Keppel* may be properly limited to its facts (that is, the existence of a statute explicitly requiring that due care be exercised), the case provides a starting point for arguing that equitable considerations should always be taken into account when discussing the scope of protection afforded under the ITCA. The appellate courts recently have considered this argument in other cases involving claims of governmental bad faith and outrageous conduct.

D. Bad Faith and the ITCA

In *Indiana Department of Correction v. Stagg*,⁸⁴ the Indiana Court of Appeals for the Fourth District held that there is no requirement to show good faith to qualify for immunity under the ITCA.⁸⁵ The facts are as follows: Stagg was an attorney who occasionally represented

77. The Board's power exists pursuant to the Indiana Drainage Code, IND. CODE § 36-9-27-1 to -113 (1988 & Supp. 1990).

78. *Van Keppel*, 556 N.E.2d at 336.

79. *Id.* The court relied on *Cain v. Board of Commr's of Cass County*, 491 N.E.2d 544, 548 (Ind. Ct. App. 1986).

80. *Van Keppel*, 556 N.E.2d at 336.

81. *Id.* (emphasis by the court).

82. *Id.*

83. *Id.*

84. 556 N.E.2d 1338 (Ind. Ct. App. 1990).

85. *Id.* at 1341.

criminal defendants on a court-appointed basis. In 1986, she was appointed to represent a prisoner who was incarcerated at the Indiana State Farm prison. Stagg met with the prisoner in January, February, and March of 1986 to prepare his defense.⁸⁶ The prisoner entered a guilty plea in April 1986.⁸⁷

In June 1986, Stagg received a letter from the prisoner that included a memorandum that had been placed in his prison file when he was transferred from the Indiana State Farm to the Indiana Reformatory. The memorandum stated that the prisoner had employed an attorney who was romantically involved with the prisoner. Stagg brought a small claims action against the Department of Correction and its employees. The trial court found for Stagg, adopted Stagg's proposed conclusions of law, and stated that the defendants were not entitled to immunity because they did not act in good faith in writing the memorandum.⁸⁸

The defendants appealed and contended they were immune from suit under Indiana Code section 34-4-5.6-3. The court of appeals reversed the trial court and held that "there is no requirement of a showing of good faith in order to qualify for the immunity" afforded under the ITCA.⁸⁹ The court stated that "although the matter was poorly handled, we do not find the defendants' conduct rises to the level of 'outrageous conduct,' nor do we find they acted outside the scope of their employment."⁹⁰ The court seemed to suggest that bad faith could not be demonstrated if the defendants were acting within the scope of their employment, absent a finding of outrageous behavior.

However, Judge Staton, quoting *Campbell v. State* in his dissent,⁹¹ stated that the ITCA was merely a codification of the common law doctrine of sovereign immunity.⁹² Under the common law, "[t]hree considerations are foremost in a determination as to the applicability of this qualified privilege."⁹³ The third such consideration is "whether the action was *made in good faith* (improper motives or a malicious purpose in exercising the discretion would, at common law, vitiate the immunity

86. Stagg always met with the prisoner at the maximum security unit of the prison. She complied with all the regulations and submitted to all searches of her person and briefcase.

87. *Stagg*, 556 N.E.2d at 1340.

88. *Id.* at 1341.

89. *Id.*

90. *Id.* at 1344.

91. 259 Ind. 55, 284 N.E.2d 733 (1972). See *supra* notes 19-21 and accompanying text.

92. *Stagg*, 556 N.E.2d at 1345 (Staton, J., dissenting).

93. *Id.* (Staton, J., dissenting) (quoting Note, *Sovereign Immunity in Indiana — Requiem?*, 6 IND. L. REV. 92, 104 (1972)).

privilege).’’⁹⁴ The dissent suggested that the issue of bad faith goes directly to the question of whether the actors were acting within the scope of their employment.

The dissent in *Stagg* persuasively argued that a governmental defendant should be required to demonstrate good faith in order to preserve ITCA immunity.⁹⁵ Under the majority’s holding in *Stagg*, if an employee is technically acting within the scope of his employment, the employee enjoys ITCA discretionary act immunity absent outrageous conduct.⁹⁶ As suggested by the dissent, the existence of bad faith (not “outrageous conduct”) should necessarily be taken to demonstrate that the governmental employee was acting outside of the scope of his employment.⁹⁷ In such cases, immunity should be denied.⁹⁸ As demonstrated by the uniqueness of the next case, if a court must find outrageous conduct to deny ITCA immunity, there will be few instances in which such immunity is denied.

E. Outrageous Conduct

The most recent case decided by the court of appeals since *Peavler* is *City of Wakarusa v. Holdeman*.⁹⁹ In *Holdeman*, a deputy marshall was involved in a motor vehicle accident with Holdeman. The marshall was traveling northbound checking license plates of trucks traveling southbound. He was checking the license plates by looking in his rear-view mirror and looking over his shoulder. He failed to see that the traffic ahead of him had stopped, and he hit Holdeman’s vehicle. The marshall admitted that he was not paying attention. The case went before the court on the defendant’s motion for summary judgment. The defendant argued that his conduct did not amount to “outrageous conduct” as a matter of law. The trial court held that the question of whether the conduct was outrageous — and, therefore, unprotected by the ITCA — was one of fact.¹⁰⁰ Summary judgment was denied and the marshall appealed; the appellate court affirmed the denial of the summary judgment.¹⁰¹

94. *Id.* (Staton, J., dissenting) (emphasis added).

95. *Id.* at 1344-46 (Staton, J., dissenting).

96. *Id.* at 1344.

97. *Id.* at 1345 (Staton, J., dissenting).

98. In *Kellogg v. City of Gary*, the Indiana Supreme Court recognized that public officials must be able to demonstrate the existence of a reasonable good faith belief in the correctness of their action in order to preserve the qualified immunity to nonjudicial public officers exercising discretionary, policy-making acts. 562 N.E.2d 685, 707 (Ind. 1990) (citing *Harlow v. Fitzgerald*, 452 U.S. 800, 818 (1982)).

99. 560 N.E.2d 109 (Ind. Ct. App. 1990).

100. *Id.* at 110.

101. *Id.* at 111.

The appellate court determined that the very nature of the activity could be considered "a disregard for the safety of others."¹⁰² The court noted that the disregard may not have been conscious, but reckless to the point of outrageousness.¹⁰³ The court relied on *Seymour National Bank v. State*,¹⁰⁴ which stated that acts may be so outrageous that they are incompatible with the performance of the duty and therefore are beyond the scope of employment.¹⁰⁵

The progression of appellate decisions from *Van Keppel* to *Stagg* to *Holdeman* suggests that immunity under the ITCA may be susceptible to challenge through the use of a variety of well-reasoned equitable arguments. Other Indiana Supreme Court post*Peavler* decisions concerning the ITCA's notice provisions are additional evidence suggesting a favorable judicial climate in which to challenge the ITCA.

F. ITCA Notice Provisions

In *Collier v. Prater*,¹⁰⁶ the Indiana Supreme Court considered for the first time¹⁰⁷ the question of substantial compliance with the ITCA's notice provisions based purely on content. Alleging that two officers used excessive force in the appellant's arrest, the appellant's attorney sent a tort claim notice to the Indianapolis Police Department within the statutory 180-day period. The question for the court concerned the content of the notice and whether it "afforded the city an opportunity to investigate the impending claim."¹⁰⁸ The court found that the claim "stated an intent to seek damages, noted that the damages were for injuries received during an arrest, identified the persons involved in that arrest, and explained that the full extent of . . . [the] damages could not be ascertained."¹⁰⁹ However, the appellant's notice did not include the place or date of the event.

Vacating the court of appeals, the Indiana Supreme Court ruled that the plaintiff's notice substantially complied with the Tort Claims Act.¹¹⁰ The court held that the absence of any reference to the place or date in the claim was not important; the appellees had the necessary

102. *Id.* at 110.

103. *Id.* This is the first Indiana case finding that a governmental employee's act could be outrageous enough to fall outside of the employee's scope of employment.

104. 428 N.E.2d 203 (Ind. 1981), *appeal dismissed*, 457 U.S. 1127 (1982).

105. *Id.* at 204.

106. 544 N.E.2d 497 (Ind. 1989).

107. "The issue of what constitutes substantial compliance where the content of the notice is being challenged has not been squarely before this Court." *Id.* at 499.

108. *Id.* at 500-01.

109. *Id.* at 500.

110. *Id.*

information to make an adequate investigation.¹¹¹ The only information necessary in a tort claim notice is that which will afford the state “an opportunity to investigate the impending claim.”¹¹² Further, the court held that “substantial compliance [with the Act], while not a question of fact but one of law, is a fact-sensitive determination.”¹¹³ Considering all the facts, the court reasoned that the City of Indianapolis had received more than enough information in the plaintiff’s notice to investigate and prepare for legal action.¹¹⁴ The court concluded by stating that “[j]ust as the notice statute should not become a trap for the unwary, neither should it become a refuge for the unconscientious.”¹¹⁵

G. Loss, Property Rights, and the ITCA

In its most recent post*Peavler* decision, the Indiana Supreme Court held that lost wages and fringe benefits are property rights for purposes of the ITCA.¹¹⁶ In *Holtz v. Board of Commissioners of Elkhart County*, the supreme court analyzed the issue of whether an action for retaliatory discharge is based in tort or in contract. It held that the claim was

111. *Id.*

112. *Id.* at 500-01.

113. *Id.* at 499.

114. *Id.* at 499-500.

115. *Id.* at 500 (citations omitted).

116. *Holtz v. Board of Commr's of Elkhart County*, 560 N.E.2d 645 (Ind. 1990). The Indiana Supreme Court, in holding lost wages and fringe benefits to be property rights, overruled the Indiana Court of Appeals for the Fourth District. *Id.* at 648. The court of appeals held that a claim for retaliatory discharge is not a “loss” under the ITCA. *Holtz v. Board of Commr's of Elkhart County*, 548 N.E.2d 1220, 1222 (Ind. Ct. App. 1990). The court of appeals also held that an employee at will does not have a property interest in his employment. *Holtz*, 560 N.E.2d at 646-47.

Holtz filed a complaint for retaliatory discharge alleging the Board of Commissioners terminated his employment because he took actions to notify the Attorney General and the Indiana Department of Highways of certain deficiencies in the bridge inspection procedure used by the county. *Id.* at 646. *Holtz* did not file a notice of tort claim with the Board. The trial court entered summary judgment in favor of the Board. The trial court concluded that mandatory discharge was a tort rather than a contract claim, and *Holtz*’s claim was therefore barred because he did not provide notice as required by the ITCA. *Id.* The court of appeals did not discuss whether the claim was one of tort or contract because it found the claim did not fall within the Tort Claims Act. *Id.* at 647. The court of appeals looked to the ITCA definition of loss. The definition is “injury to or death of a person, or damage to property” IND. CODE § 34-4-15.5-1(4) (1988).

The court of appeals also relied upon the Indiana Supreme Court’s holding in *Collier v. Prater*, 544 N.E.2d 497 (Ind. 1989): the Tort Claims Act is in “derogation to common law rights and should be strictly construed against limitations on a claimant’s right to bring suit.” *Holtz*, 548 N.E.2d at 1222. The court of appeals in *Holtz* thus held that the Tort Claims Act does not apply to retaliatory discharge, and therefore the notice provisions did not apply. *Holtz*, 560 N.E.2d at 647.

tortious in nature because the act of discharge is intended to cause an "intentional invasion."¹¹⁷ The court concluded that the plaintiff's claim was subject to the ITCA because it could not interpret the ITCA as "applying only to some torts."¹¹⁸ Further, the court held that the damages sought by the plaintiff were property *rights* cognizable as "loss" under the ITCA.¹¹⁹ The court held that the legislature intended all torts committed against either persons or property to be included in the definition.¹²⁰

Justice Dickson and Justice DeBruler dissented, and stated that the majority failed to strictly construe the ITCA as it acknowledged it should.¹²¹ The *Holtz* dissent relied on the court's decision in *Collier* which held that the ITCA was to be strictly construed "against limitations on a claimant's right to bring suit."¹²² In addition, the dissent found the ordinary meaning of the term "loss" to apply to nothing more than harm to a *person* or *property*. It found that to define "loss" to apply to a property right is contrary to the plain meaning of the term "loss" and contrary to the holdings in *Collier* and *Morris*.¹²³

IV. SECTION 1983 AND THE ITCA

Administrative agency employees are not immune from their own personal or political predilections, or from those of their superiors. When agency action is materially influenced by ill will, prejudice, or politics, what can an aggrieved party do? Recent Indiana appellate decisions suggest that one remedy may be to sue under 42 U.S.C. § 1983¹²⁴ for

117. *Holtz*, 560 N.E.2d at 646.

118. *Id.* at 647.

119. *Id.*

120. *Id.* at 645-46.

121. *Id.* at 648 (Dickson, J., dissenting) (citing *Collier v. Prater*, 544 N.E.2d 497, 498 (Ind. 1989)).

122. *Id.* (Dickson, J., dissenting) (quoting *Collier*, 544 N.E.2d at 498). *See also* *Indiana State Highway Commr's v. Morris*, 528 N.E.2d 468, 473 (Ind. 1988) (ITCA "must be strictly construed and narrowly applied.").

123. *Holtz*, 560 N.E.2d at 648 (Dickson, J., dissenting). It should be noted that the majority's definition of property, though relatively inclusive, does not preclude use of the argument advanced by the court of appeals — that individuals can suffer losses other than to their property or as personal injury, and therefore fall outside the scope of the ITCA. Perhaps one of the clearest examples of such a loss would be when, as in the case of an environmental permit, a statute and a regulation clearly indicate that such a permit is not property and conveys no property rights. In such instances, when the loss of a permit or the failure to obtain a permit is caused by a tortious act of the state or one of the state's employees, it seems clear that the court of appeals holding in *Holtz* may yet have some vitality despite the Indiana Supreme Court's decision.

124. 42 U.S.C. § 1983 (1988) states as follows:

deprivation of the party's constitutionally guaranteed due process rights. Since 1982, the United States Supreme Court has held that plaintiffs need not exhaust state court remedies prior to bringing a section 1983 action in federal court.¹²⁵ In 1988, the Court extended this exception to the exhaustion doctrine by holding that plaintiffs need not exhaust state administrative remedies prior to filing a suit in *state* court.¹²⁶ In *Felder v. Casey*, the Court reasoned that

there is simply no reason to suppose that Congress meant 'to provide . . . [§ 1983 plaintiffs] immediate access to the federal courts notwithstanding any provision of state law to the contrary, . . . yet contemplated that those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injury.'¹²⁷

The *Felder* Court also held that section 1983 actions brought in state court are exempt from the notice of claim provisions usually found in a state's tort claims act.¹²⁸ In Wisconsin,¹²⁹ the state's tort claims act provided that

no action may be brought or maintained against any state governmental subdivision, agency, or officer unless the claimant either provides written notice of the claim within 120 days of the alleged injury, or demonstrates that the relevant subdivision, agency, or officer had actual notice of the claim and was not prejudiced by the lack of written notice.¹³⁰

The Court held that Wisconsin's notice-of-claim statutes undermined the "uniquely federal remedy" provided by section 1983 by (1) condi-

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

125. *Patsy v. Board of Regents of Fla.*, 457 U.S. 496 (1982).

126. *Felder v. Casey*, 487 U.S. 131 (1988).

127. *Id.* at 147 (citations omitted).

128. *Id.* at 151-53.

129. Wisconsin is the state in which *Felder* originated.

130. *Felder*, 487 U.S. at 136 (citing WIS. STAT. § 893.80(1)(a) (1983 & Supp. 1987)). Indiana has a similar statute. However, in Indiana, claims must be filed within 180 days and there is no provision for showing that lack of written notice was not prejudicial. IND. CODE § 34-4-16.5-6 to -7 (1988).

tioning plaintiffs' recovery under section 1983 upon compliance with a state statute of which the sole purpose (to minimize government liability) is "manifestly inconsistent" with the purpose of the federal statute, by (2) discriminating against a federal right, and by (3) operating "in part, as an exhaustion requirement."¹³¹ All of these factors contributed to the Court's holding:

[T]he enforcement of such statutes in § 1983 actions brought in state court will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal courts. *States may not apply such outcome-determinative law when entertaining substantive federal rights in their courts.*¹³²

The court added that "a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy."¹³³

The immunity that *Felder* held to be preempted by section 1983 was granted by state law under a tort claims act. Those cases in no way diminished a state's immunity to section 1983 suits brought in federal courts under the eleventh amendment to the United States Constitution.¹³⁴ Eleventh amendment immunity can only be lost by a clear waiver of the immunity by the state.¹³⁵ In Indiana, the legislature has preserved eleventh amendment immunity by statute¹³⁶ and, consequently, a section 1983 action against the state or agencies of the state will not lie in federal court.¹³⁷

131. *Felder*, 487 U.S. at 141-42 (citation omitted).

132. *Id.* at 141 (emphasis added). See also *Kellogg v. City of Gary*, 562 N.E.2d 685, 690 (Ind. 1990), wherein the Indiana Supreme Court quotes this same passage from *Felder*.

133. *Felder*, 487 U.S. at 139 (citing *Martinez v. California*, 444 U.S. 277, 284 (1980)).

134. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

135. *Hendrix v. Indiana State Pub. Defender Sys.*, 581 F. Supp. 31, 32 (N.D. Ind. 1984).

136. IND. CODE § 34-4-16.7-3 (1988) provides that "[n]othing contained in this chapter shall be construed as a waiver of the eleventh amendment to the Constitution of the United States, as consent by the state of Indiana or its employees to be sued in any federal court, or as consent to be sued in any state court beyond the boundaries of the state of Indiana."

137. *Hendrix*, 581 F. Supp. at 32.

However, after *Felder*, a section 1983 claimant who chooses to bring an action in a state court clearly should not be required to exhaust administrative remedies prior to such filing, nor should the action be precluded either on substantive or procedural grounds by a state's tort claims act.

The Indiana Supreme Court followed *Felder* in *Werblo v. Hamilton Heights School Corp.*¹³⁸ In that decision, the Indiana Supreme Court addressed the issue of whether a section 1983 action is subject to the ITCA notice provision. The plaintiff, a school teacher who was dismissed for insubordination, filed a three-count complaint in the trial court, the first count alleging that the school corporation had violated her civil rights under 42 U.S.C. § 1983. The trial court dismissed the section 1983 claim because the plaintiff had failed to comply with the 180-day notice provision of the ITCA. The court of appeals upheld the trial court's determination regarding the section 1983 claim.¹³⁹

The court of appeals decision was handed down prior to the United States Supreme Court decision in *Felder*. The Indiana Supreme Court consequently overruled the court of appeals, and held that a section 1983 action is not subject to the ITCA notice requirement.¹⁴⁰ Although *Werblo* marked the Indiana Supreme Court's first opportunity to follow *Felder*, the Indiana court of appeals first recognized *Felder* in a 1988 decision, *George v. Hatcher*.¹⁴¹

Thus, in Indiana, section 1983 claims are no longer subject to the notice provisions of the ITCA. Additionally, the Indiana Supreme Court has held that *Felder* is applicable to more than just the notice provisions in the ITCA.¹⁴² In *Kellogg v. City of Gary*, the court of appeals found that the "failure of the citizens to wait until their claim had been denied in whole or part before bringing suit against the city violated section 12 of the Indiana Tort Claims Act, Indiana Code section 34-4-16.5-12, and was fatal to their claim."¹⁴³ The Indiana Supreme Court reversed, holding that the lower court's decision "contravenes that of the United States Supreme Court in *Felder v. Casey*."¹⁴⁴ The *Kellogg* decision suggests that section 1983 preempts all of those portions of the ITCA contrary to the remedial purposes of the federal civil rights statute.

138. 537 N.E.2d 499 (Ind. 1989).

139. *Id.* at 500.

140. *Id.* at 501.

141. 527 N.E.2d 199 (Ind. Ct. App. 1988).

142. *See Kellogg v. City of Gary*, 562 N.E.2d 685 (Ind. 1990).

143. *Id.* at 688. IND. CODE § 34-4-16.5-12 (1988) provides that "[a] person may not initiate a suit against a governmental entity unless his claim has been denied in whole or in part."

144. *Kellogg*, 562 N.E.2d at 688.

In addition to their impact on the ITCA, *Werblo* and *Felder* may have significantly altered the relationship between the exhaustion doctrine and section 1983. "Pre*Felder*" Indiana cases uniformly held that when a plaintiff had a remedy under the state's Administrative Adjudication Act (AAA),¹⁴⁵ "the provisions of the AAA supersede the provisions of § 1983 in actions brought in *state* court."¹⁴⁶ Those cases probably have been overruled by *Felder* to the extent that they require the exhaustion of AOPA procedures prior to filing a section 1983 action in a state court.

V. COMPENSATION FOR THE REGULATORY TAKING OF PRIVATE PROPERTY

A. Introduction

The power of eminent domain is one of the government's most potent tools to promote the safety, health, morals, and general welfare of the public at large. However, when the government chooses to exercise this power, it must compensate individual owners for the "taking."¹⁴⁷ The fifth amendment's prohibition against takings has been applied to the states through the fourteenth amendment.¹⁴⁸ Additionally, article 1, section 21 to the Indiana Constitution provides that "[n]o person's property shall be taken by law, without just compensation"¹⁴⁹ Thus, the government clearly has the right to take private property for the public good, but it must reimburse the private property owner with appropriate compensation.

When the government physically occupies private property, there can be little question that a compensable taking has occurred.¹⁵⁰ Questions do arise, however, when governmental action simply *restricts* the use of certain property to the detriment of the property owner *without compensation*. The United States Supreme Court has long recognized that when an agency restricts the use of private property, a taking can occur

145. The AAA is an earlier version of the AOPA.

146. *May v. Blinzinger*, 460 N.E.2d 546, 550 (Ind. Ct. App. 1984) (emphasis added). See also *State v. Taylor*, 419 N.E.2d 819, 824 (Ind. Ct. App. 1981); *Thompson v. Medical Licensing Bd. of Ind.*, 180 Ind. App. 333, 347-48, 398 N.E.2d 679, 680 (1979), *cert. denied*, 449 U.S. 937 (1980).

147. The fifth amendment of the United States Constitution reads in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

148. See, e.g., *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896).

149. IND. CONST. art. I, § 21.

150. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

if the restriction is not reasonably necessary to effect a substantial government purpose.¹⁵¹ When the taking occurs, the government must provide compensation.¹⁵²

Actions for inverse condemnation are particularly appropriate in permit situations when an agency either refuses or fails to issue an appropriate permit notwithstanding that all permit requirements have been satisfied. The Indiana Supreme Court addressed the issue of such regulatory takings in *Department of Natural Resources v. Indiana Coal Council, Inc.*¹⁵³ In that case, the Department of Natural Resources (DNR) prohibited a landowner — the Huntington Machinery & Equipment Rental, Inc. (HUMER) — from strip mining the 6.57 acre tract of its land that contained the archaeologically significant “Beehunter’s Site.”¹⁵⁴ DNR designated the tract unsuitable for surface coal mining pursuant to its authority under Indiana Code section 13-4.1-14-2.¹⁵⁵ As part of its final order, however, DNR included a “mitigation plan” that would allow the designation of an “area unsuitable” to be removed from the final order.¹⁵⁶ In holding that DNR’s action did not amount to a regulatory taking, the Indiana Supreme Court relied upon the two-prong test provided by the United States Supreme Court in *Nollan v. California Coastal Commission*.¹⁵⁷

151. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978).

152. *See Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922). Recently, the United States Supreme Court reconsidered the “takings” question in *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987). The Court held that when a regulation provides that “individuals are given a permanent and continuous right to pass to and from, so that the real property may continuously be traversed even though no particular individual is permitted to station himself permanently,” a permanent physical occupation has occurred and just compensation must be provided. *Id.* at 832.

153. 542 N.E.2d 1000 (Ind. 1989), *cert. denied*, 1104 S. Ct. 1130 (1990).

154. Both HUMER and the Indiana Coal Council challenged the DNR decision in the Dubois Circuit Court. The circuit court ruled that the statute relied upon by DNR was unconstitutional. *Id.* at 1001-02. The Indiana Supreme Court took the case on transfer to decide the constitutionality of the state statute.

155. The court determined that the tract was unsuitable because such mining would “affect fragile and historic lands in which the operation could result in significant damage to important historic, cultural, scientific, and aesthetic values and natural systems.” *Coal Council*, 542 N.E.2d at 1002 (quoting IND. CODE § 13-4.1-14-4 (1987)).

156. The court pointed out that the mitigation plan called for site testing and data recovery conducted by a DNR-approved archaeological contractor. *Coal Council*, 542 N.E.2d at 1002. The plan did not require HUMER to carry out the plan, to expend any money, or to convey any property or property right to the state. The court noted that the designation did not prevent HUMER from mining so long as the coal lying underneath the 6.57 acre Beehunter Site was extracted by means other than strip mining. *Id.* For these reasons, the court held that DNR’s order designating the Beehunter Site as an area unsuitable for surface coal mining and providing the mitigation plan did not amount to a taking of property. *Id.*

157. 483 U.S. 825, 1834 (1987).

The United States Supreme Court held that a land use regulation is not a taking if it “*substantially* advances a legitimate state interest and does not deprive an owner of economically viable use of his property.”¹⁵⁸ In *Nollan*, the Court chose the “substantial advancement” standard but made clear that a standard had not finally been settled on for all situations.¹⁵⁹ Although the Indiana Supreme Court chose to follow the *Nollan* two-prong test, it did not follow the substantial *advancement* standard. Instead, the Indiana Supreme Court held in *Coal Council* that a “substantial *relationship*” is the necessary nexus between state action and state interest.¹⁶⁰ As applied, however, the court found this to be the same standard used in *Nollan*.¹⁶¹

Because removal of the archaeological information from the site prior to mining did not require actual conveyance of the property, this condition was not subject to the same heightened scrutiny as a land use restriction, and consequently it did not amount to a taking.¹⁶² The court held that DNR’s action was merely a regulation — rather than a taking — because the intrusion was minimal from an economic standpoint.¹⁶³ Even so, the Indiana court made clear that the conditions requiring the removal of the restrictions were in accord with *Nollan*.¹⁶⁴

Considering the second prong of the taking test — deprivation of use in an economically viable manner¹⁶⁵ — *Coal Council* also established guidelines for determining what is considered an economically viable use. Specifically, the court considered why HUMER originally bought the property and how the regulation affected the value of the property.¹⁶⁶ The court also inquired as to whether the designation of the Beehunter’s Site as an area unsuitable for surface coal mining interfered with the present use of the property.¹⁶⁷ HUMER did not expect to mine coal when it purchased the property. Because the property owner in *Coal Council* had originally purchased the property for farming purposes, the court held that the designation did not interfere with HUMER’s “distinct investment-backed expectation.”¹⁶⁸ The court was not persuaded that HUMER’s loss of less than two percent of its coal reserves at the site

158. *Coal Council*, 542 N.E.2d at 1002 (emphasis added) (citing *Nollan*, 483 U.S. at 834).

159. *Nollan*, 483 U.S. at 834, 841-42.

160. *Coal Council*, 542 N.E.2d at 1005.

161. *Id.*

162. *Id.* at 1006.

163. *Id.*

164. *Id.*

165. *Id.* at 1004.

166. *Id.*

167. *Id.*

168. *Id.*

would have a significant impact on the value of the total property. The court reaffirmed that a property owner is not entitled to the best, highest use of his property.¹⁶⁹

HUMER's final argument, that the director's order for mitigation was arbitrary, capricious, and an abuse of discretion, did not persuade the court.¹⁷⁰ In finding against HUMER, the supreme court adopted the court of appeals' rule that "an administrative act is arbitrary and capricious only where it is willful and unreasonable, without consideration and in disregard of the facts or circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion."¹⁷¹

Coal Council does not expand the concept of regulatory takings in Indiana significantly beyond the guidelines established by the United States Supreme Court. However, *Coal Council* does succeed in clearly establishing that there must be a substantial relationship between the state's action and the state's interest in order to avoid a regulatory taking.¹⁷² *Coal Council* provides the framework through which future Indiana claimants will have to proceed in order to recover under the theory of regulatory taking.

VI. ACTIONS FOR MANDATE

Actions for mandate¹⁷³ are extraordinary civil remedies that are equitable in nature.¹⁷⁴ The purpose of such actions is to empower courts to compel the performance of a legal duty that an inferior court has not performed. An action for mandate will only lie when the lower court or agency has failed to act in the face of a clear legal duty.¹⁷⁵

By statute, an action for mandate may be prosecuted against an inferior tribunal, corporation, public or corporate officer, or person.¹⁷⁶ The scope of mandate actions has been interpreted to encompass actions against administrative agencies.¹⁷⁷ A court has jurisdiction to order an

169. *Id.*

170. *Id.* at 1007.

171. *Id.* (citing *Metropolitan School Dist. of Martinsville v. Mason*, 451 N.E.2d 349 (Ind. Ct. App. 1983)).

172. *Id.* at 1005-07.

173. IND. CODE § 34-1-58-1 (1988 & Supp. 1990). An action for mandate was formerly known as a writ of mandate.

174. *See generally* *Cleary v. Board of School Commr's of City of Indianapolis*, 438 N.E.2d 12 (Ind. Ct. App. 1982).

175. *See, e.g.,* *Marcum v. Marion County Superior Court*, 403 N.E.2d 806 (Ind. 1980).

176. IND. CODE § 34-1-58-2 (1988).

177. *See generally* *Indiana Bd. of Fin. v. Marion County Superior Court*, 396 N.E.2d 340 (Ind. 1979).

administrative agency to perform a statutory duty that is clear and imperative.¹⁷⁸ However, the jurisdiction is not all-encompassing. The court may not properly order an agency to accomplish a discretionary act in a particular manner.¹⁷⁹

In *Lake Station v. Moore Real Estate, Inc.*,¹⁸⁰ the Indiana Supreme Court broadened its jurisdiction over actions in mandate in the administrative agency arena. The court held that resort to the court is appropriate when the agency refuses to act, thereby denying the injured party an appealable decision.¹⁸¹

In *Lake Station*, Moore Real Estate brought an action for mandate and damages against the city building commission alleging the commission failed to decide whether to grant a building permit. Moore had applied for the permit on March 12, 1985. The building commission discussed the application two days later and determined it needed more information. The next month, the application was again discussed, but the commission tabled the decision until receiving approval and legal advice from the city attorney.¹⁸² Finally, after no further action, Moore mailed the city a notice of tort claim on October 12, 1985, and one week later filed a complaint for mandate and damages.¹⁸³

The Indiana Supreme Court held that when an agency refuses to act, resort to the courts is appropriate.¹⁸⁴ In so holding, the court discussed the doctrine of exhaustion of administrative remedies. In Indiana, when an administrative remedy is provided it generally must be exhausted

178. See generally *State v. Board of Trustees of Spring Valley School Corp.*, 430 N.E.2d 791 (Ind. Ct. App. 1982).

179. See generally *State v. Stateler*, 424 N.E.2d 150 (Ind. Ct. App. 1981).

180. 558 N.E.2d 824 (Ind. 1990).

181. *Id.* at 828.

182. Moore's attorney attempted to contact the city attorney by letters and phone calls. Moore's attorney even met with the city's counsel. Finally, in early October 1985, Moore's attorney spoke with the city attorney who informed Moore's attorney that Moore did not comply. The commission did not take any action on the application.

183. *Lake Station v. Moore Real Estate, Inc.*, 537 N.E.2d 61 (Ind. Ct. App. 1989), resolved an interlocutory appeal brought by Lake Station when its motion to dismiss the claim, because Moore untimely filed the tort claim notice, was denied. The court of appeals reversed the trial court and held Moore filed its tort claim notice more than 180 days after the omission causing the alleged loss. *Id.* at 62-63. The notice requirement applied only to the damages portion of the complaint filed against Lake Station. In *Lake Station v. Moore Real Estate, Inc.*, 558 N.E.2d 824 (Ind. 1990), the Indiana Supreme Court held that there was a continuing wrong because the building commission failed to ever deny, grant, or otherwise act on the application. *Id.* at 827. The supreme court overruled the court of appeals and held the tort claims notice was timely filed. *Id.* at 828.

184. *Lake Station*, 558 N.E.2d at 828.

before judicial review may be sought.¹⁸⁵ The court explained that the doctrine of exhaustion of administrative remedies “places responsibility for administrative decisions with administrative bodies, where they belong.”¹⁸⁶ The court then noted that the commission ignored its responsibility by not ruling or taking any action that could be appealed to the Building Department Review Board.¹⁸⁷ Therefore, the supreme court held that resort to the courts is appropriate when a governmental entity will not act.¹⁸⁸

The *Lake Station* decision and the prior decisions of the Indiana Supreme Court clearly show that if an agency does not take the action it has a statutory duty to take, or if an agency unreasonably delays such actions or refuses to issue any appealable order, a court through an action for mandate can compel the agency to act in accordance with its legal duty.¹⁸⁹ *Lake Station* takes a significant step toward forcing administrative agencies to make the determinations or rulings that are in their power. After *Lake Station*, those who are confined by administrative inaction will have an alternative when an agency puts them on indefinite hold.

VII. CONCLUSION

Administrative agencies affect virtually all aspects of daily life. Administrative law was developed to provide cost-effective remedies to peoples' problems. The administrative bureaucracy, however, does not provide an effective solution when administrative agencies act — or fail to act — for improper purposes. In those cases, aggrieved persons have

185. See *supra* notes 11-14 and accompanying text for a general discussion of exhaustion of remedies. See generally *East Chicago v. Sinclair Refining Co.*, 232 Ind. 295, 111 N.E.2d 459 (1953). The Municipal code of the City of Lake Station provides: “Any person adversely affected by any such ruling, action or determination by the Building Commissioner may appeal to the Building Department Review Board.” LAKE STATION, IND. CODE § 1355.03 (1981).

186. *Lake Station*, 558 N.E.2d at 828.

187. *Id.* at 827-28.

188. *Id.* at 828. The road for the *Moore* decision was paved in 1958 when *Town of Homcroft v. Macbeth*, 238 Ind. 57, 148 N.E.2d 563 (1958), was decided. In that case, the town board of zoning appeals argued that courts did not have authority to order the granting of a variance. The court rejected the argument and reasoned that “it is for the courts to protect ultimately the owner’s rights and decide the judicial question presented.” *Id.* at 64, 148 N.E.2d at 567. The principle of *Macbeth* was affirmed in *Knutson v. Seberger*, 239 Ind. 656, 157 N.E.2d 469, *reh’g denied*, 160 N.E.2d 200 (1959). In *Knutson*, the supreme court affirmed a trial court’s order that directed a town board to approve a proposed plat. The court in *Knutson* stated that “it cannot be said that the court abused its discretion in ordering the appellants to perform the duty imposed upon them by statute.” *Id.* at 664, 157 N.E.2d at 473.

189. See *supra* note 188.

a largely untapped arsenal of litigative weapons, including tort claims, actions for inverse condemnation, and actions for mandate. The cases from and immediately prior to this survey period suggest that the Indiana Supreme Court may be willing to open the door a bit further to those parties seeking extra-administrative remedies. Yet some appellate decisions from the same period demonstrate a reluctance to follow the higher court's lead. Even so, would-be litigants will find that all of these cases, when taken together, provide fertile (though uneven) ground for pursuing extra-administrative remedies to administrative actions or inactions.

Bankruptcy in the Seventh Circuit: 1989-1990

DOUGLASS G. BSHKOFF*

On May 12, 1989, the Seventh Circuit handed down what probably will turn out to be the most widely discussed and controversial bankruptcy opinion originating in any circuit during the 80s, *Levit v. Ingersoll Rand Financial Corporation (In re V. N. Deprizio Construction Co.)*.¹ This survey of Seventh Circuit bankruptcy opinions begins a few weeks later and spans a period of fourteen months.² None of the court's work during this time span will attract as much attention as *Deprizio*. Nonetheless, the output of the Seventh Circuit during this period was substantial and several of its decisions already have been cited by, or should attract the attention of, other circuits. I have not attempted to discuss every opinion that resolves a bankruptcy dispute. Rather, this Article focusses on the most significant and interesting decisions.

I. POWERS OF AVOIDANCE

The ability of a trustee to avoid pre-bankruptcy transfers was the primary issue in only two decisions.³ Both opinions, however, are important. *Belisle v. Plunkett*⁴ already has found its way onto the pages of a bankruptcy casebook,⁵ and the more recently decided *In re Taxman Clothing Co., Inc.*⁶ seems likely to attract the attention of both academics and practitioners.

The debtor in *Belisle*, ostensibly acting on behalf of a partnership, purchased a fifty-year leasehold interest in a shopping center with funds provided by several partners. Although Debtor appeared as the owner of record, he recognized the partnership for tax purposes and informed

* Professor of Law, Indiana University-Bloomington. My colleague, Bruce Markell, has not reviewed this Article. However, we have discussed many of the cases mentioned in the text, much to my profit. I am also indebted to Alexander C. Nigh, Class of 1992, for valuable research assistance.

1. 874 F.2d 1186 (7th Cir. 1989).

2. June 1, 1989 to August 31, 1990.

3. *Belisle v. Plunkett*, 877 F.2d 512 (7th Cir.), cert. denied sub nom. *Belisle v. Anzivino*, 110 S. Ct. 241 (1989); *In re Taxman Clothing Co., Inc.*, 905 F.2d 166 (7th Cir. 1990).

4. 877 F.2d 512.

5. D. BAIRD AND T. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 410 (2d ed. 1990).

6. 905 F.2d 166.

the partners of the income and deductions they should report on their own tax returns. From the perspective of tenants and creditors, however, Debtor appeared to be the sole owner of the premises. The court held that the leasehold interest is part of the bankruptcy estate, unencumbered by the interest of any of the partners.⁷

Section 544(a)(3)⁸ of the Bankruptcy Code was the vehicle for bringing this parcel of real property into the bankruptcy estate.⁹ Under non-bankruptcy state law, because the partnership's interest in the leasehold was not recorded, a constructive trust for the benefit of the other partners was imposed on the debtor's interest. Normally, property in a trust is not used to satisfy the claims of the fiduciary's unsecured creditors.¹⁰ However, in the Virgin Islands, a bona fide purchaser will take free of the unrecorded partnership interests.¹¹ Therefore, the hypothetical bona fide purchaser test contained in section 544(a)(3) permitted incorporation of this asset into the bankruptcy estate.¹²

Judge Easterbrook found no contradiction between this aspect of the strong-arm power and section 541(d),¹³ which denies the trustee access to "property in which the debtor holds, as of the commencement of the case, only legal title" ¹⁴ He observed:

Section 541(d) does not have anything to say about the effects of § 544(a)(3). It forbids including property in the debtor's estate "under subsection (a) of this section" and does not address whether property may be included under some other part of the Code. The courts that have perceived a conflict between §§ 541(d) and 544(a)(3) did not discuss this limitation on the domain of § 541(d).¹⁵

Judge Easterbrook misreads the statute. Property can become part of the bankruptcy estate only through the operation of section 541(a). The existence of rights arising under section 544(a) or any other avoiding power does not alone create an estate asset. A potentially avoidable transfer must actually be avoided pursuant to section 550¹⁶ and then

7. 877 F.2d at 515.

8. 11 U.S.C. § 544(a)(3) (1988). Section 544(a)(3) gives the trustee the status of a bona fide purchaser as of the commencement of the bankruptcy.

9. *Belisle*, 877 F.2d at 515.

10. *See* *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05 nn.8, 10 (1983).

11. *Belisle*, 877 F.2d at 514.

12. *Id.* at 515.

13. 11 U.S.C. § 541(d) (1988).

14. *Id.*

15. *Belisle*, 877 F.2d at 515.

16. 11 U.S.C. § 550 (1988).

incorporated into the estate via section 541(a)(3) before the transaction is complete. Thus, the language of section 541(d) cannot be ignored. A contradiction exists between this statutory limitation on the augmentation of the bankruptcy estate and the avoidance power exercised in *Belisle*.¹⁷ One possible resolution of the statutory impasse is to rely on the legislative history of section 541(d), which was designed to protect traditional mortgage servicing arrangements, a type of transaction not present in *Belisle*.¹⁸

Such a construction of section 541(d) does not, however, produce a solution for another problem caused by the interaction between the various parts of the statute. Suppose that Debtor is the duly constituted trustee of an express trust with a power of sale. It is well established that a sale by such a trustee to a bona fide purchaser cuts off any equitable interest of the beneficiary even if the transfer was a breach of the trust.¹⁹ If the trustee is involved in bankruptcy proceedings, can its bankruptcy trustee use section 544(a)(3) to bring any of the trust's realty into the bankruptcy estate unburdened by the equitable rights of the beneficiary? It is hard to believe that any court would so hold, yet this result seems to flow naturally from the current statutory language.²⁰

This situation could not arise under the prior bankruptcy statute because the bankruptcy trustee was not permitted to claim bona fide purchaser status. Collier approved of this limitation on the trustee's power of avoidance, and noted the mischief that would result from allowing the trustee to place himself in the position of a bona fide purchaser:

17. Judge Easterbrook's reading of the statute is correct after the 1984 amendment to § 541(d). See *infra* note 20. However, he did not view the statutory change as relevant to the disposition of this case. See *Belisle*, 877 F.2d at 514 n.3.

18. This legislative history is used to confirm the court's reading of § 541. See *Belisle*, 877 F.2d at 516.

19. RESTATEMENT (SECOND) OF TRUSTS § 284 (1959).

20. Prior to 1984, the risk posed by operation of § 544(a)(3) to a beneficiary of an express trust was less than obvious. Section 541(d) applied to all categories of property in the bankruptcy estate, including property acquired through exercise of an avoiding power, and it may have been assumed that beneficiaries of an express trust did not need to fear use of § 544(a)(3). To a casual reader of § 541(d), the language chosen by Congress probably appeared broad enough to protect the beneficiary of an express trust. The situation changed when § 456(c) of the Bankruptcy Amendments and Federal Judgeship Act of 1984 [98 Stat. 392] amended § 541(d) and restricted its application to the first two clauses of § 541(a). See *Billings v. Cinnamon Ridge, Ltd. (In re Granada, Inc.)*, 92 Bankr. 501, 508 (Bankr. D. Utah 1988). Since then, the argument that the beneficiary of an express trust should lose its interest to the bankruptcy trustee has become more obvious.

[S]ince such an interpretation [of the strong-arm clause] would mean that the trustee would not be subject to liabilities such as to return property fraudulently obtained by the bankrupt, *or to account for trust funds*, the theory received short shrift in the courts.²¹

The potential for mischief foreseen by Collier now exists, and it is predictable that a trustee will attempt to gain control of real estate assets held by a fiduciary.²²

Several years ago, the Seventh Circuit attracted attention when it chose cost (to the debtor) as the appropriate measure of asset value for the purpose of determining whether there had been any pre-bankruptcy improvement in the position of a partially secured creditor.²³ A majority of the *Ebbler* court was willing to allow the decision of the bankruptcy judge to stand without an extensive discussion of the statutory policy behind section 547(c)(5).²⁴ This prompted Judge Easterbrook to write a concurring opinion in which he offered some guidance on the search for statutory meaning. Approving of the use of wholesale value, he observed:

To give the Bank more than the wholesale value is to induce a spate of asset-grabbing among creditors, which could make all worse off. If the Bank gets the whole increment of value (from wholesale to retail) during the last 90 days, other creditors may respond by watching the debtor closely and propelling it into bankruptcy when it has a lower inventory (and therefore less "markup" for the Bank to seize). The premature filing may reduce the value of the enterprise. There are other defensive measures available to creditors. The principle function of Section 547(c)(5) is to reduce the need of unsecured creditors to protect themselves against the last-minute moves of secured creditors. It would serve this function less well if goods subject

21. 4B COLLIER ON BANKRUPTCY ¶ 70.52 (14th ed. 1978) (emphasis supplied).

22. *In Re Mill Concepts Corp.*, 123 Bankr. 938, 947 (D. Mass. 1991) criticizes the reasoning and result in *Belisle*. Cf. *Research-Planning, Inc. v. Segal* (*In re First Capital Mortgage Loan Corporation*), 917 F.2d 424 (10th Cir., 1990). In *Research-Planning*, the debtor, an escrow agent, improperly used trust funds to pay a creditor. Following the settlement of a preference action, its funds became part of the bankruptcy estate. The court rejected the argument that the recovered funds should be impressed with a constructive trust to protect the beneficiary of the escrow arrangement. *Id.* at 428 n.4. The reasoning in this decision supports a concern that all express trusts are at risk.

23. *In re Ebbler Furniture and Appliances, Inc.*, 804 F.2d 87 (7th Cir. 1986).

24. *Id.* at 91. See 11 U.S.C. § 547(c)(5) (1988). Once the trustee has established the existence of a preferential transfer, § 547(c)(5) protects the transferee except to the extent that the transferee has improved its position "to the prejudice of other creditors holding unsecured claims" in the pre-bankruptcy period of vulnerability.

to a security interest were appraised at their retail price.²⁵

Judge Easterbrook's conclusion is inconsistent with this reasoning. When the issue is whether section 547(c)(5) of the Bankruptcy Code prevents avoidance, the use of retail values rather than wholesale values is more helpful to the bankruptcy trustee.²⁶ Nonetheless, the Easterbrook concurrence is significant because it is the initial articulation of a pro-avoidance approach to statutory interpretation, an approach that was reaffirmed in *In re Xonics Imaging, Inc.*²⁷ and, most recently during this survey period, in *In re Taxman Clothing Co., Inc.*²⁸

In *In re Taxman*, Judge Posner observed:

We begin by asking — what is always a useful type of question to ask in a case — *why* the law is interested in whether the debtor was insolvent at some point before he declared bankruptcy. The reason is that once a firm is in acute peril the temptation to try to keep afloat in the hope that its luck will change may lead it to strike a deal with its key creditors to the prejudice of its other creditors. Knowing this, the other creditors, unless protected by the voidable-preference rule, will be quick to force the firm into bankruptcy in order to crystalize their own entitlements. The rule induces creditors to be more forbearing, and by doing so makes it less likely that firms will be pushed into bankruptcy prematurely. . . .²⁹

Despite the Seventh Circuit's repeatedly professed tilt in favor of avoidance, *Taxman's* value determination is not going to help bankruptcy trustees in avoiding transfers. *Taxman* determined that assets should be valued at their going-concern value, rather than their liquidation value for the purpose of determining whether the debtor was

25. *Ebler*, 804 F.2d at 92.

26. When there is an improvement in position, the dollar disparity will be greater when retail value is used. Because the improvement in position test limits the trustee's right to recover assets, the use of wholesale values in this subsection will produce smaller recoveries than the use of retail values.

For example, assume a loan of \$12,000,000 secured by a lien on inventory that was completely replaced during the 90 days preceding bankruptcy. The wholesale value of the inventory at the beginning of the 90 day period is \$5,000,000. By the date of bankruptcy it has increased to \$6,000,000. Assuming that the wholesale value is 50% of retail, the net recovery using wholesale values is \$1,000,000 (\$6,000,000 gross transfer limited to \$1,000,000 improvement in position), while retail values produce a \$2,000,000 recovery (\$12,000,000 gross transfer limited to a \$2,000,000 improvement in position).

27. 837 F.2d 763, 765 (7th Cir. 1988).

28. 905 F.2d 166 (7th Cir. 1990).

29. *Id.* at 169.

solvent ninety days before bankruptcy.³⁰ This going-concern valuation led to a finding of solvency and to the frustration of the trustee's attempt to avoid the transfers.

II. CLAIMS

Within a span of three months, the Seventh Circuit decided three significant cases in which the propriety of equitable subordination was the principal issue.³¹ The first decision, *In re Virtual Network Services Corp.*,³² decided that a non-pecuniary loss tax penalty³³ should be subordinated to the claims of other general unsecured creditors in a Chapter 11 liquidating bankruptcy.³⁴ The same result would occur if the liquidation had been under Chapter 7.³⁵ To accomplish this result, the court turned to and analyzed the equitable subordination provision contained in section 510(c)(1) of the Bankruptcy Code.³⁶ Although equitable subordination ordinarily requires some inequitable conduct associated with the subordinated claim,³⁷ *Virtual Network* appears to be the first Court of Appeals decision under the 1978 Code to invoke section 510(1)(c) in the absence of wrongful activity. Nonetheless, the decision makes sense because it helps to minimize the substantive differences between a straight bankruptcy and a liquidating 11.

It may be argued that incorporating the result required by section 726 into a Chapter 11 bankruptcy is inconsistent with the direction found in section 103(b) that "Subchapters I and II apply only in a case under such Chapter."³⁸ A recent Eighth Circuit opinion³⁹ that cites *Virtual Network* with approval addresses this issue, and adds some helpful observations on the relationship between Chapters 7 and 11.

30. *Id.* at 170. See generally Cohen, "Value" Judgments: Accounts Receivable Financing and Voidable Preferences Under the New Bankruptcy Code, 66 MINN. L. REV. 639 (1982).

31. *In re Virtual Network Services Corp.*, 902 F.2d 1246 (7th Cir. 1990); *Kham & Nate's Shoes No. 2 v. First Bank of Whiting*, 908 F.2d 1351 (7th Cir. 1990); *In re Lapiana*, 909 F.2d 221 (7th Cir. 1990).

32. 902 F.2d 1246.

33. "Non-pecuniary loss tax penalty" is a claim by the IRS to collect money for delinquent taxes. See 26 U.S.C. § 6653 (1988). Because the amount is in excess of the tax due and owing, these claims are considered non-pecuniary losses. *Virtual Network*, 902 F.2d 1246, 1246 n.1.

34. *Virtual Network*, 902 F.2d at 1250.

35. 11 U.S.C. § 726(a)(4) (1988). Section 726(a)(4) automatically subordinates non-compensatory penalty claims to forth priority.

36. 11 U.S.C. § 510(c)(1) (1988).

37. 3 COLLIER ON BANKRUPTCY ¶ 510.05[2] (15th ed. 1990).

38. 11 U.S.C. § 103(b) (1988).

39. *Schultz Broadway Inn v. United States*, 912 F.2d 230 (8th Cir. 1990).

The Government additionally argues that the current Bankruptcy Code precludes subordination of non-pecuniary loss penalties in proceedings under chapter 11. In support of this contention, the Government points out that Congress, in enacting the Bankruptcy Reform Act of 1978, rejected a proposal to automatically subordinate non-pecuniary loss penalty claims to the claims of unsecured creditors in all bankruptcy proceedings. Instead, Congress expressly subordinated non-pecuniary loss penalty claims only in chapter 7. Thus, under the Government's view, Congress intended to restrict subordination of punitive claims to proceedings under chapter 7. We again disagree.

We first consider that the equitable subordination provisions of Section 510(c)(1) apply to all chapters of the Bankruptcy Code. We further observe that chapter 7, which applies purely to liquidations, is more conducive to a uniform rule subordinating penalty claims than is chapter 11, which can be used both by reorganizing businesses and by liquidating businesses. In other words, in proceedings under chapter 7, Congress could be certain that in most cases the debtor would cease operations with assets that were insufficient to cover the creditors' claims in full. Therefore, in the chapter 7 context, a uniform rule subordinating penalty claims recognizes that ordinary creditors should receive protection from debtors' punitive obligations.

The same rule, however, would be inappropriate for proceedings under chapter 11. In chapter 11 proceedings, Congress expected that many debtors would continue their operations under a reorganization plan and ultimately return to a viable and profitable economic state. In such cases, the debtor, quite rightly, should bear the burden of its full punitive obligations. Where a chapter 11 debtor opted to liquidate, however, the consequences to creditors could be very similar to a proceeding under chapter 7. Accordingly, we are not persuaded by the Government's argument that the silence of chapter 11 as to penalty claims exempts such claims from subordination under section 510(c)(1). We deem it just as likely that Congress deliberately chose to leave to the Bankruptcy Court, to determine on a case-by-case, the question of whether a penalty claim should be subordinated in a proceeding under chapter 11.⁴⁰

It is too early to tell whether *Virtual Network* represents a sharp break with traditional views concerning equitable subordination or is

40. *Id.* at 233-234 (citations omitted).

only an attempt to conform a liquidating 11 to the provisions of Chapter 7. In July 1990, another panel of the Seventh Circuit declined the invitation to extend *Virtual Network's* no-wrongful conduct rule to a bank that had engaged in post-petition financing pursuant to section 364(c)(1)⁴¹ and then exercised its discretionary right to discontinue advances.⁴² As for *Virtual Network*, the court observed:

Equitable subordination usually is a response to efforts by corporate insiders to convert their equity interests into secured debt in an anticipation of bankruptcy. Courts require the insiders to return to their position at the end of the line. *Virtual Network* extends principles of equitable subordination to a penalty created by operation of law, where delay in collecting the penalty injured other creditors. But Bank is neither an insider nor a person seeking to collect a penalty, and it has not delayed without justification. It contributed new value under a contract, and it wants no more than the priority Judge Toles promised as the lure.

. . . Debtor submits that conduct may be "unfair" and "inequitable" . . . even though the creditor complies with all contractual requirements, but we are not willing to embrace a rule that requires participants in commercial transactions not only to keep their contracts but also do "more" — just how much more resting in the discretion of a bankruptcy judge assessing the situation years later. . . .

. . . Firms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of "good faith". Although courts often refer to the obligation of good faith that exists in every contractual relation, this is not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the document. "Good faith" is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting. . . . When the contract is silent, principles of good faith . . . fill the gap. They do not block use of terms that actually appear in the contract.

. . . .

Although debtor contends, and the bankruptcy judge found,

41. 11 U.S.C. 364(c)(1) (1988).

42. *Kham & Nate's Shoes No. 2 v. First Bank of Whiting*, 908 F.2d 1351 (7th Cir. 1990).

that Bank's termination of advances frustrated Debtor's efforts to secure credit from other sources, and so propelled it down hill, this is legally irrelevant so long as Bank kept its promises. . . .

The only breach on Bank's part that Debtor has identified is the technical one: the contract calls for five calendar days' telephonic and written notice, while Bank gave only written notice. . . . Equitable subordination under § 510(c) is not a device to magnify the damages available for inconsequential breaches of contract.⁴³

The last in the trio of equitable subordination cases, *In re Lapiana*,⁴⁴ involved conduct by a senior lienor alleged to be detrimental to a junior lienor. In 1981, two parcels of land owned by the Debtors were burdened with a senior federal tax lien and a junior judgment lien. One of the parcels was sold but the sale did not produce enough money to satisfy the tax claim. Accordingly, the Government's prior lien on the second parcel of land continued to accrue interest as permitted by section 506(b) of the Bankruptcy Code.⁴⁵ In 1983, the bankruptcy judge ordered the trustee to pay the proceeds of the sale to the Internal Revenue Service in partial satisfaction of its claim. The trustee did not do so until some twenty months later and, even then, only paid over part of the sale proceeds. He embezzled the rest. Shortly thereafter, the second property was sold and the United States Government claimed all of the proceeds. The junior lienor argued that the Government was not entitled to accrue post-petition interest because of the delay in collecting the proceeds of the first sale. The District Court reversed because it believed the junior lienor was equally culpable in not forcing a timely pay-over of the proceeds.

The Seventh Circuit affirmed the District Court because it agreed that the junior lienor was culpable.

[I]t behooved Lee [the junior lienor] to take the proper steps to stop the interest clock from running. Even if interest is not accruing on senior liens, moreover, the prudent junior lienor will be ever mindful of the importance of clearing senior liens from the property they encumber. . . . [The junior lienor] assumed that the proceeds of the first sale would be enough to pay off the government in full, leaving the remaining property free and clear of any liens (except mortgage liens) superior to

43. *Id.* at 1356-59 (citations omitted).

44. 909 F.2d 221 (7th Cir. 1990).

45. 11 U.S.C. 506(b) (1988).

his own. But like many assumptions this was a dangerous one, as it ignored the government's colorable right to interest.⁴⁶

The most interesting aspect of this decision, however, is the warning offered to the Internal Revenue Service and presumably to other secured creditors enjoying senior status.

The Internal Revenue Service would be well advised . . . to institute a procedure for notifying junior liens of the status of the Service's liens; we were told at argument, without contradiction, that no such procedure exists. The existence of such a procedure would at small cost lighten the burden that we conclude rests on the junior lienor to protect himself from the consequences of section 506(b) and would head off lawsuits such as this. . . .⁴⁷

Although the Seventh Circuit does not explicitly state that failure to provide such a warning will prejudice the rights of a senior lienor, an argument for equitable subordination can be made. Fairly read, *Lapiana* suggests that presented with different facts, the court might very well accept the argument that inequitable conduct — either delay in enforcement or failure to notify — will prevent a senior lienor from accruing interest under section 506(b) to the detriment of a junior encumbrancer. Moreover, nothing in *Lapiana* suggests that the enforcement delay theory of subordination can be invoked only by junior lienors. Unsecured claimants also should be able complain if such delay occurs.

III. PROCEDURE

*In re Powelson*⁴⁸ provides an excellent illustration of how the awkward procedural framework for bankruptcy litigation adopted by Congress in the wake of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁴⁹ offers litigants numerous opportunities for delaying tactics. This opinion should be required reading for any person interested in an example of what is wrong with the current relationship between the district court and bankruptcy judges.

In January of 1986, the Powelsons, who are farmers, petitioned for relief under Chapter 11. Almost two years later, the bankruptcy

46. *Lapiana*, 909 F.2d at 225.

47. *Id.*

48. 878 F.2d 976 (7th Cir. 1989).

49. 458 U.S. 50 (1982). For a general discussion of the current statute, see King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675 (1985).

judge finally confirmed a liquidating plan offered by creditors⁵⁰ after the debtors had failed to file an acceptable disclosure statement and reorganization plan. The farmer-debtors' attempt to secure reconsideration of the confirmation order and/or a conversion to Chapter 12 was unsuccessful, and they filed a notice of appeal to the district court on February 19, 1988. On the same day, the debtors also filed a motion to withdraw the reference to the bankruptcy judge.⁵¹ Thus, they simultaneously were asking the district court to act as a trial court and as an appellate court. This delaying tactic was successful. The district judge withdrew the case and stayed enforcement of both the creditor's liquidating plan and the debtors' appeal. The district court also accepted, but did not formally confirm, a substituted plan offered by the debtors, which allowed them to remain in possession for four years while repaying their creditors.

The Seventh Circuit expressed doubt as to whether the motion for withdrawal was either timely or warranted by the facts. Its concern with this confusing maneuver was well founded. Withdrawal is one of the mechanisms employed by Congress to ensure adequate participation by an Article III judge in the bankruptcy decision-making process.⁵² Exercise of the power to withdraw results in a shift of initial decision-making authority from an Article I judge to an Article III judge. Once a ruling has been made by the bankruptcy judge, however, appeal rather than withdrawal is the proper way to challenge this decision.⁵³ Withdrawal should no longer be considered appropriate except as to matters still unresolved at the trial level. For example, in *Powelson*, since confirmation had occurred, withdrawal would be appropriate only to deal with post-confirmation matters still remaining to be resolved by the bankruptcy judge,⁵⁴ and even then should only be for cause.⁵⁵ The Fifth Circuit has offered some guidance as to when withdrawal is appropriate:

50. Farmers are normally protected against involuntary liquidation. However, a creditor-sponsored liquidation in Chapter 11 is permissible. *Button Hook Cattle Co. v. Commercial Nat'l Bank and Trust Co. (In re Button Hook Cattle Co.)*, 747 F.2d 483 (8th Cir. 1984); *Jasik v. Conrad (In re Jasik)*, 727 F.2d 1379 (5th Cir. 1984).

51. 28 U.S.C. § 157(d) (1988) requires withdrawal of the reference to the bankruptcy judge in certain instances and also permits withdrawal for "cause." A permissive withdrawal request, if by a party, must be timely. It has been suggested that a "timeliness restriction" should also apply to withdrawal of the reference *sua sponte*. *In re Pruitt*, 910 F.2d 1160, 1171-72 (3d Cir. 1990) (Mansmann, J., concurring).

52. *King*, *supra* note 49, at 695.

53. *Cf. Powelson*, 878 F.2d at 983.

54. *See, e.g.*, 11 U.S.C. § 1144 (1988) (revocation of confirmation).

55. *Powelson*, 878 F.2d at 983.

Marathon provides the outer boundary of original referred jurisdiction of bankruptcy courts, but considerations of judicial economy also bear on the decision to withdraw the reference or refer to the bankruptcy court. The district court should consider the goals of promoting uniformity in bankruptcy administration, reducing forum shopping and confusion, fostering the economical use of the debtors' and creditors' resources, and expediting the bankruptcy process.⁵⁶

None of these suggested factors supports the action taken in *Powelson*. Indeed, the opposite is true. The action of the district court in *Powelson* sends the wrong message to future litigants, thereby creating an incentive to forum shop, producing confusion, and resulting in a waste of resources.⁵⁷ *Powelson* recognizes this, but only in a tentative fashion.

The timing of the court's withdrawal of the reference here, *even if not improper, seems* to be in conflict with the statutory objectives of utilizing the expertise of bankruptcy judges, reducing forum shopping and preserving the appellate processes provided by the Bankruptcy Act.⁵⁸

Unfortunately, the final order doctrine⁵⁹ made it impossible to achieve normal appellate review of the district court's activity, a review that surely would have resulted in a reversal and an unequivocal condemnation of what occurred following withdrawal. However, none of the challenged actions — the decision to withdraw, the stay of confirmation, or the substitution of a revocable interim plan — qualified as a final order subject to normal appellate review. Judge Cudahy indicated that the facts ordinarily would warrant the issuance of a writ

56. *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 999 (5th Cir. 1985). See also *Hatzel & Buehler, Inc. v. Central Hudson Gas & Elec. Corp.*, 106 Bankr. 367 (D. Del. 1989); *Sullivan v. Maryland Casualty Co. (In re Ramex Int'l, Inc.)*, 91 Bankr. 313 (E.D. Pa. 1988); *American Community Servs., Inc. v. Wright Mktg., Inc. (In re Am. Community Servs., Inc.)*, 86 Bankr. 681 (D. Utah 1988); *Wedtech Corp. v. London (In re Wedtech Corp.)*, 81 Bankr. 237 (S.D.N.Y. 1987); *Acolyte Elec. Corp. v. City of New York*, 69 Bankr. 155 (Bankr. E.D.N.Y. 1986); *Price-Watson Co. v. Amex Steel Corp. (In re Price-Watson Co.)*, 66 Bankr. 144 (Bankr. S.D. Tex. 1986); *In re Dunes Casino Hotel*, 63 Bankr. 939 (D.N.J. 1986); *WSC Corp. v. International Harvester Co. (In re Wisconsin Steel Corp.)*, 48 Bankr. 753 (N.D. Ill. 1985); *Lesser v. A-Z Assocs. (In re Lion Capital Group)*, 48 Bankr. 329 (S.D.N.Y. 1985).

57. For a decision that clearly recognizes how inefficient withdrawal would be in a situation similar to *Powelson*, see *In re Dunes Casino Hotel*, 63 Bankr. 939 (D.N.J. 1986).

58. *Powelson*, 878 F.2d at 983 (emphasis added) (citation omitted).

59. See generally Cuevas, *Judicial Code Section 158: The Final Order Doctrine*, 18 Sw. U.L. REV. 1 (1988).

of mandamus, but not in this case because of possible creditor acquiescence in the highly unusual action taken by the district court.⁶⁰ Since *Powelson*, the Third Circuit has unequivocally condemned this type of maneuvering in the context of a Chapter 13 proceeding.⁶¹

Ordinarily, we would remand this matter to this district court with instructions that it make findings on cause to withdraw the reference. In this case, however, because the bankruptcy judge did all he could do and entirely disposed of the case, we believe cause to withdraw did not exist.⁶²

Marathon casts a long shadow. Its effect also can be seen in the distinction drawn between core and non-core proceedings by 28 U.S.C. § 157. The bankruptcy judge is permitted to act as the ultimate decision-maker only when a controversy is a core proceeding.⁶³ Without the parties' consent, disputes designated as non-core proceedings, however, only can be resolved by an Article III judge.⁶⁴ A recent Seventh Circuit case, *Barnett v. Stern*,⁶⁵ considers how the core/non-core distinction can affect application of claim preclusion rules. In *Barnett*, proceeding #1 was an adversary proceeding before a bankruptcy judge in which the trustee successfully established that a trust was the debtor's alter-ego and that trust assets were property of the estate. Proceeding #2, in a federal district court, alleged a RICO violation because the trust had been used to conceal assets of the bankruptcy estate. Relying heavily on a recent Fifth Circuit opinion,⁶⁶ the court refused to give *res judicata* effect to proceeding #1.⁶⁷ The RICO claim, if asserted in that litigation, would have been a related, non-core proceeding.⁶⁸ Because the bankruptcy judge would not have had authority to make a final determination on the RICO claim, claim preclusion could not be a consequence of the first lawsuit.

Neither the Seventh Circuit's opinion in *Barnett* nor its predecessor in the Fifth Circuit acknowledges the possibility that claim preclusion effect can follow a determination rendered in a forum that lacks full

60. *Powelson*, 878 F.2d at 984. The case was remanded to the district court for findings concerning the alleged creditor consent. *Id.* There have been no published reports of further proceedings.

61. *In re Pruitt*, 910 F.2d 1160 (3rd Cir. 1990).

62. *Id.* at 1169 (citing *Powelson*, 878 F.2d at 983-84).

63. 28 U.S.C. § 157(b)(1) (1988).

64. *Id.* § 157(c)(1).

65. 909 F.2d 973 (7th Cir. 1990).

66. *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183 (5th Cir. 1990).

67. *Barnett*, 909 F.2d at 981-82.

68. *Id.*

jurisdictional competence. Such a result is possible under the rule stated in section 24 of the RESTATEMENT (SECOND) OF JUDGMENTS.⁶⁹

When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.⁷⁰

The comments explain:

The rule stated in this Section [barring further litigation] . . . is applicable although the first action is brought in a court which has no jurisdiction to give a judgment for more than a designated amount. When the plaintiff brings an action in such a court and recovers judgment for the maximum amount which the court can award, he is precluded from thereafter maintaining an action for the balance of his claim. *It is assumed that a court was available to the plaintiff in the same system of courts* . . . where he could have sued for the entire amount. . . . The same considerations apply when the first action is brought in a court which has jurisdiction to redress an invasion of a certain interest of the plaintiff, but not another, and the action goes to judgment on the merits. The plaintiff, having voluntarily brought his action in a court which can grant him only limited relief, cannot insist upon maintaining another action on the claim.⁷¹

This general rule, however, is qualified by section 26(1)(c).⁷²

When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

. . . .

(c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the

69. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982).

70. *Id.* (citations omitted). In *Barnett*, because the first action was successful and the bankruptcy court ordered a turnover of trust assets, 909 F.2d at 975, the rule of merger should have precluded further litigation. See RESTATEMENT (SECOND) OF JUDGMENTS § 18 (1982).

71. RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment g (emphasis added) (illustrations omitted).

72. *Id.* § 26(1)(c).

first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.⁷³

Again, a helpful elaboration appears in the comments:

The general rule of § 24 is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a litigant's presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.

The formal barriers referred to may stem from limitations on the competency of the *system of courts* in which the first action was instituted, or from the persistence in the system of courts of older modes of procedure—the forms of action or the separation of law from equity or vestigial procedural doctrines associated with either.⁷⁴

The reference to a "system of courts" found in each comment accurately describes the post-*Marathon* arrangement in which the bankruptcy judge exercises some, but not all, of the decision-making authority necessary to dispose of bankruptcy-related litigation. The limitation on the adjudicative authority of the bankruptcy judge is a limitation applicable to a category of decision-makers within a system, not a "limitation on the competency of the system of courts in which the first action . . . [is] instituted."⁷⁵ It is reasonable, then, to conclude that claim preclusion can be a consequence of a determination in a core proceeding.

Less than a decade ago, the significance of jurisdictional competence was before the United States Supreme Court in *Marrese v. American Academy of Orthopedic Surgeons*.⁷⁶ The precise question was whether

73. *Id.*

74. *Id.* § 26 comment c (emphasis added).

75. *Id.*

76. 470 U.S. 373 (1985). See generally Note, *Applying Res Judicata in Antitrust Cases: Marrese Provides an Approach, But Few Answers*, 18 IND. L. REV. 573 (1985).

a state court judgment in a common law tort action should be given preclusive effect in subsequent antitrust litigation that only could be maintained in federal court. If the court had given an affirmative answer, that outcome would be strong support for the view that preclusive effect can be given to a core proceeding. *Marrese*, unfortunately, provides no definitive answer because the case was remanded for further proceedings. Justice O'Connor's majority opinion, however, assumes that jurisdictional competency is a normal condition for claim preclusion.

With respect to matters that were not decided in [the first proceeding], we note that claim preclusion generally does not apply where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts" Restatement (Second) of Judgments § 26(1)(c) (1982). If state preclusion law includes this requirement of prior jurisdictional competency, which is generally true, a state judgment will *not* have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts.⁷⁷

Nonetheless, later in the same opinion, Justice O'Connor recognized that a different rule might be called for when an intramural, as contrasted with an intersystem, law of preclusion is applied.

If we had a single system of courts and our only concerns were efficiency and finality, it might be desirable to fashion claim preclusion rules that would require a plaintiff to bring suit initially in the forum of most general jurisdiction, thereby resolving as many issues as possible in one proceeding. The decision of the Court of Appeals approximates such a rule inasmuch as it encourages plaintiffs to file suit initially in federal district court and to attempt to bring any state law claims pendant to their federal antitrust claims. Whether this result would reduce the overall burden of litigation is debatable and we decline to base [the outcome in this case] on our opinion on this question.⁷⁸

The authorities just discussed do not warrant the conclusion that *Barnett* was incorrectly decided. They do, however, support the view that the availability of claim preclusion in bankruptcy litigation is a topic that merits more careful consideration by appellate courts than

77. *Marrese*, 470 U.S. at 382 (brackets and emphasis in original).

78. *Id.* at 385 (citations omitted).

it has received to date. The precise content of preclusion rules will, of course, ultimately reflect both the special characteristics of bankruptcy disputes and the general attitudes toward claim preclusion in all types of federal litigation.⁷⁹

*In re Pence*⁸⁰ merits attention because it departs from the normal practice in bankruptcy, placing a burden of inquiry on creditors. The appellant, Pacesetter Bank, objected to the treatment provided for its lien in a confirmed Chapter 13 plan. It argued that the plan should be revoked because it had never received notice of the confirmation hearing. The Seventh Circuit was unsympathetic. Either Pacesetter received actual notice⁸¹ or

[as] a sophisticated and organized creditor, [it] had knowledge of Mrs. Pence's bankruptcy petition and should have known that a reorganization plan would have to be filed within fifteen days of the petition. Creditors, especially lending institutions like Pacesetter, must follow the administration of the bankruptcy estate to determine what aspects of the proceeding they may want to challenge. Pacesetter was not entitled to stick its head in the sand and pretend it would not lose any rights by not participating in the proceedings.⁸²

Neither the Bankruptcy Code nor the Bankruptcy Rules place a duty of inquiry on creditors. Indeed, the opposite is true. Both the statute⁸³ and rules⁸⁴ clearly require that creditors be given notice of the confirmation hearing. Although there is some authority for not always insisting on notice in dischargeability litigation,⁸⁵ the monitoring obligation imposed by *Pence* has the potential to be extraordinarily burdensome in most bankruptcy contexts.⁸⁶

79. See generally Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209, 1214-15 (1986); 18 C. WRIGHT, A. MILLER AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4403 (1981).

80. 905 F.2d 1107 (7th Cir. 1990).

81. The basis for disposing of the appeal on this ground is unclear. The Certificate of Mailing for the notice of the confirmation hearing did not contain a listing for Pacesetter Bank. Brief for Appellant at 4, 14-15, *In re Pence*, 905 F.2d 1107 (No. 89-2416).

82. *In re Pence*, 905 F.2d at 1109 (citations omitted).

83. 11 U.S.C. § 1324 (1988).

84. BANKR. R. 2002(b) (25 days notice required).

85. See, e.g., *Grossie v. Sam (In re Sam)*, 894 F.2d 778 (5th Cir. 1990). *Contra* *Spring Valley Farms v. Crow (In re Spring Valley Farms, Inc.)*, 863 F.2d 832 (11th Cir. 1989). The competing lines of authority are discussed in 8 COLLIER ON BANKRUPTCY ¶ 2002.18A (15th ed. 1990).

86. Cf. *In re Leading Edge Products*, 120 Bankr. 616 (Bankr. D. Mass. 1990) (knowledge of the filing of a Chapter 11 plan does not obligate creditor to inquire as to date of hearing on confirmation).

IV. CROSS-BORDER INSOLVENCY

In the typical cross-border insolvency, a bankruptcy proceeding will be commenced in the jurisdiction where the debtor is domiciled or has the greater portion of its assets. The representative appointed in this proceeding will then try to gain control of assets located elsewhere through negotiation or litigation. Several options are available if an asset is located in the United States and litigation is necessary. The foreign insolvency representative may sue in state court, may invoke federal diversity jurisdiction, may commence a full American bankruptcy, or institute an ancillary proceeding as authorized by section 304 of the Bankruptcy Code.⁸⁷ The main issue in most reported litigation is the extent to which, if at all, an American court should defer to action taken or proposed by the foreign representative. The adversaries usually are the foreign insolvency representative who wishes to repatriate the assets and domestic creditors who wish to keep them in the United States. The American court must decide whether to grant comity to the foreign proceeding and allow the assets to be moved abroad. *Ma v. Continental Bank*⁸⁸ presents the recognition question in a different context. Ma, a citizen of Hong Kong, was a depositor in an Illinois bank. A receiver appointed by a Hong Kong court was able to persuade the bank to return the funds without the benefit of a formal court order. Later Ma challenged this return, claiming that it was a breach of his contract with the bank because it was not pursuant to a court order.⁸⁹

The Seventh Circuit's rejection of this argument⁹⁰ will be welcomed by those who hope for greater and more flexible cooperation between countries in the administration of cross-border insolvencies. *Ma* is significant because the court decided that activity of a foreign representative can be entitled to recognition even though no formal proceedings for an ancillary administration have been initiated in the United States.⁹¹ The bank in *Ma* had the option of demanding an order issued in a section 304 proceeding. However, it was not obliged to do so.⁹²

87. 11 U.S.C. § 304 (1988). See generally Boshkoff, *United States Judicial Assistance in Cross-Border Insolvencies*, 36 INT'L & COMP. L.Q. 729, 730-743 (1987).

88. 905 F.2d 1073 (7th Cir. 1990).

89. See 11 U.S.C. §§ 304.

90. *Ma*, 905 F.2d at 1076.

91. *Id.*

92. *Id.* at 1076-77. This result is in accord with the better view that an American court can grant comity to a foreign insolvency proceeding even though the foreign representative has not commenced a § 304 proceeding. *Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452 (2d Cir. 1985) (recognition of foreign proceeding possible although § 304 proceeding is the preferred remedy). *Contra Refco F/X Assocs., Inc. v. Mebco Bank, S.A.*, 108 Bankr. 29 (S.D.N.Y. 1989) (section 304 proceeding mandatory).

Moreover, having determined that commencement of a section 304 proceeding would not be required in every case, the court went on to find that it also was not required by the facts of this particular case. Ma argued that the receiver's informal negotiation approach was prejudicial because it deprived him of the opportunity to collaterally attack the foreign proceeding. The court concluded, however, that, even if a section 304 proceeding had been commenced, the collateral attack would have failed.⁹³

V. DEBTORS' BENEFITS

There were two interesting debtors' benefits decisions during the period covered by this survey.⁹⁴ *In re Sanderfoot*⁹⁵ permitted a debtor to exercise the avoidance power contained in section 522(f)⁹⁶ and set aside a lien created in connection with a division of marital property. The issue of avoiding liens imposed incident to a dissolution of marriage has divided the other circuits as well as this particular panel.⁹⁷ The Seventh Circuit's decision is not acceptable when one considers the purpose behind section 522(f). The avoidance power authorized by this provision is designed to prevent impairment of the debtor's power to exempt property. Two conditions must exist if avoidance is to occur: (1) the impairing event must be the creation of a judicial lien and (2) prior to the creation of the lien, the debtor must have been entitled to an exemption.⁹⁸

In *Sanderfoot*, the lien on the Debtor's property was imposed by a Wisconsin state court in connection with a divorce settlement. A jointly-owned home had been awarded to the husband. The wife's interest was protected by an order of payment and a lien. This was clearly a judicial lien. Nevertheless, the second condition for exercise of the power was not satisfied — prior to the creation of the lien, the debtor was merely a co-owner of the property. Therefore, the debtor could not have claimed an exemption for his sole benefit in his spouse's share of this property.

93. *Ma*, 905 F.2d at 1076.

94. *Farrey v. Sanderfoot* (*In re Sanderfoot*), 899 F.2d 598 (7th Cir.), cert. granted, 111 S. Ct. 507 (Nov. 26, 1990); *In re Edwards*, 901 F.2d 1383 (7th Cir. 1990).

95. 899 F.2d 598.

96. 11 U.S.C. § 522(f) (1988).

97. For avoidance: *Stedman v. Pederson* (*In re Pederson*), 875 F.2d 781 (9th Cir. 1989); *Maus v. Maus*, 837 F.2d 935 (10th Cir. 1988). The *Maus* decision is distinguished in *Borman v. Leiker* (*In re Borman*), 886 F.2d 273, 274 (10th Cir. 1989) and *Parker v. Donahue* (*In re Donahue*), 862 F.2d 259, 265 (10th Cir. 1988).

Against avoidance: *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984).

98. 11 U.S.C. § 522(f) (1988).

Section 522(f)(1) is designed to nullify lien acquisition only when the property is already exemptible prior to the creation of the lien.⁹⁹ That was not true in *Sanderfoot*. Judge Posner saw this clearly and his dissent is much more persuasive than the majority opinion.

No creditor beat the debtor into court. The lien was created by a court, it is true, but not to enable a creditor to defeat his debtor's household exemption; it was done to protect a spouse's preexisting property rights.

. . . .

I am at a loss to understand why we should strain the language and ignore the purpose of the lien-avoidance statute in order to achieve a result that does not promote, but instead denies, simple justice — layman's justice.¹⁰⁰

*In re Edwards*¹⁰¹ addresses an issue that also has been the subject of some controversy. The court determined that a Chapter 7 debtor, even one current in payments to a secured creditor, must either redeem or reaffirm if she wishes to retain the collateral¹⁰²— the debtor may not simply remain in possession and continue making payments. In *Edwards*, the debtor indicated a desire to retain the collateral over the objection of the secured creditor. The bankruptcy judge ordered her to choose between a reaffirmation agreement satisfactory to the creditor, redemption, or surrender of the collateral. The Seventh Circuit correctly affirmed.¹⁰³

The debtor who wishes to retain property subject to the security interest is not entitled to redeem the collateral through installment payments. Section 722¹⁰⁴ clearly requires a lump sum cash redemption. The individual who wishes to redeem his property through installment payments, and who cannot obtain the creditor's consent to a reaffirmation arrangement, always has the option of filing under Chapter 13. Nonetheless, the Tenth Circuit has allowed the debtor to remain in possession without entering into an enforceable reaffirmation agreement.¹⁰⁵ This is unfair from the perspective of the secured creditor. If a discharge is granted, the original recourse loan becomes a non-recourse obligation

99. *In re Sanderfoot*, 899 F.2d at 606 (Posner, J., dissenting).

100. *Id.* at 606-07.

101. 901 F.2d 1383 (7th Cir. 1990).

102. *Id.* at 1386.

103. *Id.* at 1387.

104. 11 U.S.C. § 722 (1988).

105. *Lowry Fed. Credit Union v. West*, 882 F.2d 1543 (10th Cir. 1989).

without any creditor consent to the change in status. The Seventh Circuit wisely refused to follow this precedent.¹⁰⁶

106. *In re Edwards*, 901 F.2d at 1386.

Recent Developments in Contract and Commercial Law

HAROLD GREENBERG*

During the last eighteen months, there have been numerous Indiana developments in contract and commercial law, the latter being defined as the subject matter of the Uniform Commercial Code (U.C.C.). This Article reports and comments on those developments that may be of particular interest to Indiana practitioners.

I. LEGISLATION

A. The Indiana "Lemon Law"

1. *Out of State Buyers.*—As reported in a prior issue of the Indiana Law Review, when the legislature enacted the Motor Vehicle Protection Act (the "Lemon Law") in 1988,¹ it joined many other states in giving a measure of added protection to consumers who purchase automobiles characterized as "lemons" because the manufacturer or dealer is either unable or unwilling to remedy problems.² Since its enactment, there have been several significant amendments.

Originally, the statute defined "motor vehicle," in part, as a vehicle "sold to a buyer in Indiana and registered in Indiana."³ In 1990, this portion of the definition was amended to include a vehicle sold to "a

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1. IND. CODE §§ 24-5-13-1 to -24 (1988).

2. See Greenberg, *The Indiana Motor Vehicle Protection Act of 1988: The Real Thing for Sweetening the Lemon or Merely a Weak Artificial Sweetener?*, 22 IND. L. REV. 57 (1989).

3. Act of Feb. 29, 1988, Pub. L. No. 150-1988, § 5(2), 1988 Ind. Acts 1863-64. The full definition was:

As used in this chapter, "motor vehicle" or "vehicle" means any self-propelled vehicle that:

(1) has a declared gross vehicle weight of less than ten thousand (10,000) pounds;

(2) is sold to a buyer in Indiana and registered in Indiana;

(3) is intended primarily for use and operation on public highways; and

(4) is required to be registered or licensed before use or operation.

The term does not include conversion vans, motor homes, farm tractors, and other machines used in the actual production, harvesting, and care of farm products, road building equipment, truck tractors, road tractors, motorcycles, mopeds, snowmobiles, or vehicles designed primarily for offroad use.

buyer in Indiana who is not an Indiana resident."⁴ The intended effect of the amendment appears to be to protect the business of Indiana border community automobile dealers whose customers may come from Kentucky, Ohio, Michigan, or Illinois. The Kentucky Lemon Law, in particular, applies only to in-state purchases.⁵ Thus, a Kentucky resident who was aware that her state's lemon law applies only to locally purchased vehicles may well have been unwilling to buy in nearby Indiana if that protection would have been lost. With the Indiana Lemon Law extending protection to the Kentuckian who buys in Indiana, this problem for Indiana dealers is eliminated.

The original definition was also criticized because it gave no protection to the Indiana resident who bought an automobile outside the state but who lived in and registered the car in Indiana.⁶ It was irrelevant whether the car owner was an out-of-state owner who already owned the automobile when she moved here, or an Indiana resident who purchased the car elsewhere because of convenience or price. Neither of these Indiana residents benefitted from the statute. This is a gap that the legislature should have filled promptly. Unfortunately, the 1990 amendment did nothing to address this particular problem. As laudable as the goal of protecting Indiana businesses might be, it would seem more appropriate in a consumer protection measure for the legislature to have extended protection to Indiana residents and taxpayers, regardless of where they purchase their automobiles, so long as those automobiles are registered pursuant to Indiana law.⁷

2. *Leases*.—In many instances, long-term automobile leases have replaced outright purchases for any number of reasons. Section one of the Lemon Law declares that it applies to leases as well as sales.⁸ In order to clarify some problems with the application of the statute to

4. Act of Mar. 20, 1990, Pub. L. No. 141-1990, § 1, 1990 Ind. Acts 2032.

5. KY. REV. STAT. ANN. § 367.841(1) (Michie 1987): "'Buyer' means any resident person who buys or contracts to buy a new motor vehicle in the Commonwealth of Kentucky."

The situation is less clear in the other states, although the likelihood is that out-of-state purchases are covered. See ILL. ANN. STAT. ch. 121-1/2, ¶ 1202 (Smith-Hurd Supp. 1990); MICH. COMP. LAWS ANN. § 257.1401(e) (West 1990); OHIO REV. CODE ANN. § 1345.71 (Anderson 1989).

6. See Greenberg, *supra* note 2, at 68-69.

7. It should be noted that manufacturers will be no more or less affected by such a provision. With the proliferation of lemon laws throughout the country, the care taken by manufacturers in designing and building cars should not vary based on the state in which the buyers reside. Manufacturers are held only to the promises that they expressly and impliedly make at the outset: to provide safe, eventually defect-free transportation in exchange for the purchase price.

8. IND. CODE § 24-5-13-1 (1988): "This chapter applies to all motor vehicles that are sold, leased, transferred, or replaced by a dealer or manufacturer in Indiana."

leases, the statute was amended in 1989 to define a lease as a contract in the form of a lease that is to last for a term of more than four months.⁹ The amendments also set forth the manner in which any refund under the Lemon Law is to be divided between the lessee and the lessor. The lessee is entitled to recover all of her deposit and lease payments, less a reasonable allowance for use. The lessor is entitled to recover the purchase cost and other specifically enumerated costs, including insurance, sales tax, and five percent of the amount recovered by the lessee.¹⁰ The reasonable allowance for use is determined by multiplying the total lease obligation by a fraction with a numerator equal to the number of miles traveled and a denominator of 100,000.¹¹

B. U.C.C. Article 3: Variable Interest Rates and Negotiability

The basic concept underlying negotiability is that a negotiable instrument must be a "courier without luggage,"¹² that is, all of the obligations on it must be ascertainable from the face of the instrument itself without reference to anything beyond its face.¹³ This is particularly true with respect to the principal and interest due.¹⁴ Thus, the U.C.C. requires that the instrument "contain an unconditional promise or order to pay a sum certain."¹⁵ As originally adopted, the Code also stated that "the sum payable is a sum certain even though it is to be paid (a) with stated interest"¹⁶

In recent years, fluctuating interest rates have led to the use in promissory notes of variable rates of interest, that is, rates keyed to some fluctuating index such as a prevailing prime rate.¹⁷ The use of

9. IND. CODE § 24-5-13-3.7 (Supp. 1990).

10. *Id.* § 24-5-13-11.5(a).

11. *Id.* § 24-5-13-11.5(b). This is similar to the formula for an owned car. *See id.* § 24-5-13-11(b); Greenberg, *supra* note 2, at 92. Thus, if the total lease obligation is \$15,000, and the car has been driven 5,000 miles, the formula is $15,000 \times 5,000/100,000 = 750$.

12. *Overton v. Tyler*, 3 Pa. 346, 347 (1846) (classic case on this issue).

13. *See* U.C.C. § 3-105 comment 8 (1978). The official comments of the National Conference of Commissioners on Uniform State Laws and American Law Institute, sponsors of the U.C.C., were not adopted as part of, and do not appear in, Indiana's version of the U.C.C., which appears at Indiana Code § 26-1 (1988). Hereafter, reference to the U.C.C. will be to the numbering of the 1978 Official Draft, *e.g.*, § 3-105, rather than to the Indiana Code section numbers, *e.g.*, § 26-1-3-105, unless the two versions differ.

14. *See, e.g.*, J. WHITE & R. SUMMERS, *Uniform Commercial Code* § 14-4 (3d ed. 1988).

15. U.C.C. § 3-104(1)(b).

16. 1963 Ind. Acts, ch. 317, § 2-106. The Official Text of the Code still contains this definition.

17. *See* Hiller, *Negotiability and Variable Interest Rates*, 90 COM. L.J. 277 (1985)

such floating interest rates has resulted in a split in the courts on whether such promissory notes are for a sum certain, thereby affecting negotiability.¹⁸ Some authorities agree with the decisions holding that such notes are non-negotiable and are excluded from Article 3; they suggest that Article 3 be amended to include variable interest rate notes.¹⁹

In 1990, the Indiana Legislature resolved the problem by amending Indiana's version of the U.C.C. to change the title of section 3-106 from "Sum certain" to "Stated rate of interest; sum certain," and to include variable interest rate instruments within the scope of Article 3.²⁰

II. JUDICIAL DECISIONS

A. Sales: U.C.C. Article 2

1. *The Disclaimer of Implied Warranties and the Interpretation of Express Warranties: U.C.C. §§ 2-316, 2-313.*—Section 2-316(2) of the Uniform Commercial Code directs that a disclaimer of the implied warranty of merchantability "must mention merchantability" in order to be effective. In *Agrarian Grain Co. v. Meeker*, the court stated that because this section "is strictly interpreted for the protection of the buyer . . . , language such as 'there are no warranties expressed or implied' is ineffective because it does not mention merchantability" and, as a matter of law, does not exclude the implied warranty.²¹ However, almost

(According to Prof. Hiller, by 1984, 80% of new mortgage loans and 60% of all loans contained variable interest rate provisions.); Comment, *The Effect of Variable Interest Rates on Negotiability*, 48 LA. L. REV. 711 (1988); Annotation, *Negotiability of Instrument Providing for Variable Rate of Interest under UCC § 3-106*, 69 A.L.R. 4TH 1127 (1989).

18. See Annotation, *supra* note 17.

19. See, e.g., *White & Summers*, *supra* note 14, § 14-4. The new version of Article 3 proposed by the National Conference of Commissioners on Uniform State Laws agrees. It provides:

Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument. . . .

U.C.C. § 3-112(2) (1989).

20. IND. CODE § 26-1-3-106 (Supp. 1990). The section now provides, in pertinent part:

(1) For the purposes of this section, "a stated rate of interest" includes a rate of interest that cannot be calculated by looking only to the instrument but is readily ascertainable by a reference in the instrument to:

- (a) a published rate or federal statute, regulation, or rule of court; or
- (b) a generally accepted or financial index; or
- (c) a compendium of rates; or
- (d) an announced rate of a named financial institution.

21. 526 N.E.2d 1189, 1192 (Ind. Ct. App. 1988).

identical language of disclaimer was effective in *Travel Craft, Inc. v. Wilhelm Mende GmbH & Co.*²² because of the somewhat unusual factual situation of that case.

During negotiations for the purchase of an aluminum material called "Alu-Span" for use in the manufacture of mobile homes, Travel Craft, the buyer, drafted a letter containing the following warranty language, which the seller was requested to and did approve: "The seller agrees for a period of three years from the date of delivery that the product manufactured by it will be free under normal use from substantial defects in material or workmanship."²³ When the Alu-Span began to crack and separate because of structural stress, Travel Craft recalled more than 100 motor homes and sued the seller for breach of the express warranty and of the implied warranty of merchantability.

In response to the seller's defense that the implied warranty of merchantability had been disclaimed by the language of the letter, the buyer contended that the absence of the word "merchantability" rendered the disclaimer ineffective. The supreme court observed that the absence of the word "merchantability" ordinarily negates any attempted disclaimer of the implied warranty of merchantability because, as stated

22. 552 N.E.2d 443 (Ind. 1990). The opinion of the court of appeals in this case, 534 N.E.2d 238 (Ind. Ct. App. 1989), was discussed in Greenberg, *Oral Warranties and Written Disclaimers in Consumer Transactions: Indiana's End Run Around the U.C.C. Parol Evidence Rule*, 23 IND. L. REV. 199, 203-04 (1990) [hereinafter *Oral Warranties*]. The article's focus was the tension between oral express warranties made pursuant to U.C.C. § 2-313 followed by written disclaimers or merger clauses which, according to § 2-316(1), should be given effect only if the parol evidence rule of § 2-202 is satisfied. The court of appeals affirmed the exclusion of evidence of oral express warranties because the complete agreement of the parties on the subject of warranties was in writing. The supreme court agreed that the writing was the final expression of the parties' agreement as to what warranties were given.

23. *Travel Craft*, 534 N.E.2d at 239. The full text of the warranty language was: The seller agrees for a period of three years from the date of delivery that the product manufactured by it will be free under normal use from substantial defects in material or workmanship. If any product fails within three years to be free from substantial defects in material or workmanship, seller agrees to repair or replace the product, F.O.B. buyer's receiving dock, Elkhart, Indiana. This warranty includes the cost of the product and the cost of repairs or replacement of the product and any other damage that is caused by the product defect. Seller agrees to maintain insurance converging [sic] personal injury in an amount of DM \$2,000,000.00,—for each occurrence (not to exceed DM \$1,000,000.00—per individual), and for property damage and repair and replacement of product in accordance with the warranty described in this paragraph of DM \$500,000.00—each occurrence. Seller agrees to furnish to buyer a letter, on an annual basis, from the insurance carrier detailing the terms and amounts of coverage.

Id. at 241.

in *Agrarian Grain* and in the official comment to section 2-316, the intention of the Code is to protect the buyer from the surprise of an unexpected disclaimer of that implied warranty.²⁴ However, in *Travel Craft*, the buyer who drafted the disclaimer did not need such protection. In essence, the buyer could not surprise itself.²⁵

The court's position is sound. When the seller drafts the disclaimer, failure to use the term "merchantability" should rarely, if ever, be excused. Section 2-316(3) recites the rare instances when the term need not be used in the disclaimer, but the disclaimer is nevertheless effective.²⁶ However, the drafting buyer should fully understand the import of its own language and certainly needs no protection from itself.

The second issue in *Travel Craft* was whether the trial court was correct in granting summary judgment for the seller because the buyer had failed to show a specific defect. At issue was the interpretation of the express warranty that the goods "will be free under normal use from defects in materials or workmanship."²⁷ The supreme court disagreed with the trial court's interpretation of the two key terms in the warranty, "normal use" and "defect." The high court noted that the evidence conflicted as to what constituted normal use of Alu-Span and that a product may be defective either because of some imperfection or because it is not fit for the ordinary purpose for which it is sold.²⁸ The court added that the express warranty in the case "may be interpreted as tantamount to an express warranty of fitness for particular purpose."²⁹ Resolution of this issue of interpretation required the admission of the parol evidence excluded by the trial court.

2. *The Battle of the Forms: U.C.C. section 2-207.*—The so-called "battle of the forms," as dealt with in section 2-207 of the Uniform

24. See U.C.C. § 2-316 comment 1; *Travel Craft*, 552 N.E.2d at 444-45.

25. See *Travel Craft*, 552 N.E.2d at 445.

26. U.C.C. § 2-316(3) states:

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty

(emphasis added.)

27. *Travel Craft*, 552 N.E.2d at 444, 446.

28. *Id.* at 446. Although the seller contended that normal use of its aluminum product did not include use in mobile homes because of the stresses involved, the affidavit of seller's president stated that he had solicited mobile home manufacturers throughout the United States to use the product. See *Travel Craft*, 534 N.E.2d at 240; Affidavit of John Koster, President and Owner of Wilhelm Mende GmbH & Co, in Support of Motion for Summary Judgment, Record at 193-94; Greenberg, *Oral Warranties*, *supra* note 22, at 203 n.27.

29. *Travel Craft*, 552 N.E.2d at 446.

Commercial Code, continues to be waged in the courts and in commentaries.³⁰ In *Dale R. Horning Co. v. Falconer Glass Industries, Inc.*,³¹ the court characterized the issue as one of "form warfare."³² In a telephone conversation, the seller agreed to sell to the buyer quantities of glass to be used in a construction project in which the buyer was a subcontractor. On the following day, the seller sent to the buyer a standard form which stated, "'confirms verbal 8/4/86,'" stated a quotation for the glass, and contained on the reverse side numerous terms and conditions that had not been discussed on the telephone. Of particular importance was paragraph seven which warranted that the glass would be "free from material defects in manufacture," specifically disclaimed the implied warranties of merchantability and of fitness for particular purpose, limited damages to replacement of defective material or a refund of the purchase price at the seller's option, and excluded liability for incidental or consequential damages.³³ The form also included a clause directing that any lawsuit arising from the contract must be brought in New York.

When the glass proved to be defective, the seller agreed to replace it and also to pay any consequential damages. By the time the problem was fully corrected, the buyer had incurred consequential damages of \$19,000 which the seller refused to pay. In response to the buyer's suit for breach of warranty and fraud, the seller moved to dismiss on the grounds that the forum selection clause precluded suit in Indiana and the limitation of remedies and exclusion of consequential damages precluded the buyer's recovery of consequential damages as a matter of law.

The court characterized the case as involving "a straightforward application of § 2-207 of the U.C.C."³⁴ and noted that the section deals with two situations: (1) where an offer is followed by an acceptance on a standard form, and (2) "where the parties have reached an agreement and the standard form is merely a 'confirmation' of that agreement."³⁵ The court continued that where there is an already existing agreement, albeit oral, the issue is not whether a contract exists but what the terms of that contract are under section 2-207(2).³⁶

30. See, e.g., Thatcher, *Sales Contract Formation and Content —An Annotated Apology for a Proposed Revision of Uniform Commercial Code Section 2-207*, 32 S.D.L. REV. 181 (1987); Murray, *A Proposed Revision of Section 2-207 of the Uniform Commercial Code*, 6 J.L. & COM. 337 (1986).

31. 730 F. Supp. 962 (S.D. Ind. 1990) (order on bench trial); 710 F. Supp. 693 (S.D. Ind. 1989) (motion for summary judgment).

32. 730 F. Supp. at 970.

33. *Falconer Glass*, 710 F. Supp. at 695.

34. *Id.* at 697.

35. *Id.*; see U.C.C. § 2-207 comment 1.

36. *Falconer Glass*, 710 F. Supp. at 697. This approach is apparently directed by

Applying section 2-207(2)(b), the court concluded first that the forum selection clause would materially alter the contract between the parties and therefore was not part of the contract. With respect to the exclusion of consequential damages, the court stated that whether the exclusion was a material alteration so as to cause surprise or hardship to the buyer was a question of fact to be determined at trial. The grant of a motion to dismiss or for summary judgment was improper.³⁷

At the conclusion of a bench trial, the court found that the shifting of responsibility for consequential damages from the seller to the buyer by virtue of the exclusion of such damages would indeed work a hardship on the buyer who, as a subcontractor, must necessarily incur liability for delay in a construction project caused by the failure of the products it contracts to incorporate into the project.³⁸ In a candid admonition to the lawyers involved, and to all lawyers, the court stated:

The lesson to be learned from this case is that merely inserting boilerplate provisions into standard forms is not the end-all way to deal with the U.C.C. Despite the Code's rejection of the mirror image rule, it is apparent that the best, and, in some instances, the only way to get a preferable term into a contract *is to actually propose the term and reach a meeting of the minds* on the issue. The Code did not completely abolish the concept of mutual assent.³⁹

3. *Acceptance by Shipping Promptly: U.C.C. section 2-206.*—At common law, if a buyer offered to buy goods for immediate shipment and the seller responded by immediately sending nonconforming goods, the seller was deemed to have made a counter-offer and the buyer who

§ 2-207. See U.C.C. § 2-207 comment 3; H. GREENBERG, RIGHTS AND REMEDIES UNDER U.C.C. ARTICLE 2, 76-77 (1987) [hereinafter RIGHTS AND REMEDIES]; WHITE & SUMMERS, *supra* note 14, § 1-3, at 43-46. However, it is at odds with the approach taken by the Indiana Court of Appeals in *Continental Grain Co. v. Followell*, 475 N.E.2d 318 (Ind. Ct. App. 1985), in which the court stated in the opening sentence of its "Statement of the Facts" that a telephone call "resulted in an oral agreement" between the buyer and seller. *Id.* at 319. Nevertheless, rather than determining the terms of that oral agreement, the court ignored its existence, analyzed the case as one involving offer and acceptance, and concluded that no contract existed because there had been no acceptance. The author believes that the court's approach was inconsistent with the language and intention of the statute and, therefore, was misdirected. It is also interesting to note that in the *Followell* opinion, the court quoted extensively from the White & Summers (2d ed. 1980) discussion of § 2-207 but omitted (with stars indicating the omission) the authors' discussion of "Prior Oral Agreement." Compare *Followell*, 475 N.E.2d at 322 with WHITE & SUMMERS, *supra* note 14, § 1-2.

37. *Falconer Glass*, 710 F. Supp. at 700-701.

38. *Falconer Glass*, 730 F. Supp. at 967.

39. *Id.* at 970 (emphasis in original).

used the goods was deemed to have accepted that counter-offer, thereby losing his right to complain about the nonconformity. This was sometimes called the seller's "unilateral contract trick."⁴⁰ In a provision consistent with the Code concept that an offer may be accepted in any manner reasonable under the circumstances,⁴¹ and with the abolition of the "mirror image rule" that an acceptance exactly match the offer before a contract exists,⁴² the U.C.C. provides that the seller's prompt or immediate shipment constitutes an acceptance of the buyer's offer.⁴³ If the goods are nonconforming, there is a breach of contract. The seller who promptly but knowingly ships nonconforming goods may avoid accepting the buyer's offer and the concurrent breach of contract by informing the buyer that the shipment of nonconforming goods is an accommodation to the buyer, thereby making the shipment a true counter-offer.⁴⁴

In *Corinthian Pharmaceutical Systems, Inc. v. Lederle Laboratories*,⁴⁵ the buyer unsuccessfully tried to take advantage of the acceptance-by-prompt-shipment rule of section 2-206(1)(b) in an attempt to avoid a dramatic increase in a vaccine's price. Seller's standard price list stated that orders were subject to acceptance at the home office and would be invoiced at the price in effect at the time of shipment. On the day before the increase was to become effective, the buyer, with knowledge of the impending increase, ordered 1000 vials of vaccine. Two weeks later, the seller sent to the buyer fifty vials invoiced at close to the old price. The seller also sent a letter stating that the shipment was only a partial shipment, that standard practice was to charge the price in effect at the time of shipment, that in light of the magnitude of the increase this partial shipment was an exception to the practice, and that the remainder of the order would be invoiced at the new price unless the buyer objected and cancelled. The buyer sued for specific performance

40. See 3 R. DUESENBERG & L. KING, *SALES & BULK TRANSFERS UNDER THE U.C.C.*, BENDER'S UNIFORM COMMERCIAL CODE SERVICE § 402[1] (1990); H. GREENBERG, *RIGHTS & REMEDIES*, *supra* note 36, § 5.5; 2 W. HAWKLAND, *UNIFORM COMMERCIAL CODE SERIES* § 2-206:03 (1984); WHITE & SUMMERS, *supra* note 14, § 1-5.

41. U.C.C. § 2-206(1)(a).

42. See *id.* § 2-207(1).

43. *Id.* § 2-206(1)(b):

[A]n order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

44. See *id.*

45. 724 F. Supp. 605 (S.D. Ind. 1989).

to compel the seller to deliver the remaining 950 vials at the lower price.

In ruling in favor of the seller's motion for summary judgment, the court initially observed that the offer was the buyer's order for the serum. Neither the seller's price list nor the confidential memorandum in which the price increase was announced (and which the buyer had somehow obtained) constituted offers. Turning to the application of section 2-206, on which the buyer relied to show that the seller had accepted the purchase offer at the lower price, the court noted that the shipment of 1/20 of the amount ordered clearly was nonconforming. However, the letter that the seller sent to the buyer demonstrated that the nonconforming shipment was sent to the buyer not as an acceptance but as an accommodation, as "an arrangement or engagement made as a favor."⁴⁶ Consequently, the shipment plus the accommodation letter constituted a counter-offer that the buyer could accept or reject.

B. Negotiable Instruments: U.C.C. Articles 3 & 4

A bank that fails to dishonor a check by its midnight deadline is liable for the amount of the check even if there is not enough money in the drawer's account to pay it.⁴⁷ "Midnight deadline" means "midnight on [the bank's] next banking day following the banking day on which it receives the relevant item."⁴⁸ And "'banking day' means that part of any day on which a bank is open to the public for carrying on substantially all of its banking functions."⁴⁹

The sole issue in *United Bank of Crete-Steger v. Gainer Bank*,⁵⁰ was whether Saturday was a banking day for the drawee/payor bank that received the subject check on a Friday but did not process and dishonor it until the following Monday. If it was a banking day, the dishonor on Monday came too late, and the drawee bank was liable on the check. If it was not, the dishonor occurred in time. This issue reduced itself, in turn, to whether the drawee was open for "substantially all of its banking functions" on Saturday. The facts showed that the main office and branches were open only for limited services on Saturday mornings, such as the cashing of checks, making deposits and withdrawals, opening new accounts, and applying for loans. Many other functions, such as bookkeeping, access to safety deposit boxes, and commercial banking were not available. The court concluded that the availability of limited banking services did not satisfy the definitional requirements, and that

46. *Id.* at 610-11 (citing BLACK'S LAW DICTIONARY (5th ed. 1979)).

47. *See* U.C.C. § 4-302.

48. *Id.* § 4-104(1)(h).

49. *Id.* § 4-104(1)(c).

50. 874 F.2d 475 (7th Cir. 1989).

the plaintiff-bank's position improperly confused "banking day" with "business day," two distinctly different terms.⁵¹

The check involved in this case was written in 1984, thereby making unnecessary the consideration of 1987 amendments to Indiana's U.C.C. In 1987, the legislature amended the Code, apparently to deal with this very type of problem. A new definition, "partial banking day," was added to the definitions in Article 4, and "means any day on which a bank is open to the public for fewer than its regular banking hours, or any day on which a bank does not carry on substantially all of its banking functions."⁵² Furthermore, the Code was amended to provide that "with respect to a partial banking day, a bank may . . . treat any item or deposit of money received on the partial banking day as being received at the opening of business on the following full banking day."⁵³ Unfortunately, the amendments would not resolve the *Gainer Bank* problem. The court is still required to determine whether the bank conducts "substantially all" of its business on the day in question, the very issue confronted by the court in that case.

C. Secured Transactions: U.C.C. Article 9

1. *Sale of Collateral and Deficiency Judgments.*—A secured party who intends to sell the collateral of a defaulting debtor must notify the debtor of the time and place of any public sale or the date after which there will be a private sale, and every aspect of the sale must be commercially reasonable.⁵⁴ There apparently is a split among the jurisdictions as to what happens when the reselling secured party fails to comply with the requirements of the Code. The majority favors a rebuttable presumption that the reasonable value of the collateral was equal to the balance of the debt, thereby precluding recovery of a deficiency judgment. The secured party may rebut the presumption by proving both that the sale was commercially reasonable and that the value of the collateral sold was less than the balance of the debt. A minority of jurisdictions favors an absolute bar against recovery of a

51. *Id.* at 479 (quoting U.C.C. § 4-104 official comment 1).

Under [the definition of 'banking day'] that part of a *business day* when a bank is open to the public for *limited functions*, e.g., on Saturday evenings to receive deposits and cash checks, but with loan, bookkeeping and other departments closed, is not part of a *banking day*.

Id. at n.7 (emphasis in opinion).

52. IND. CODE § 26-1-4-104(1)(i) (1988).

53. *Id.* § 26-1-4-107(1)(b).

54. See U.C.C. § 9-504(3).

deficiency judgment when the creditor fails to comply with the Code's requirements.⁵⁵ Indiana follows the majority rule.⁵⁶

In *Vanek v. Indiana National Bank*,⁵⁷ without ever notifying the debtor of its intention to sell after it repossessed, the secured party sold restaurant equipment collateral for more than its appraised value but less than the balance of the debt.⁵⁸ When the bank sought to recover the deficiency, the debtor asserted that the bank had failed to prove the commercial reasonableness of the sale. The court of appeals ruled that the trial court's finding of commercial reasonableness was supported by the fact that the collateral actually sold for more than its appraised value. Therefore, the deficiency judgment was properly entered.⁵⁹

2. *Good Faith and Buying in the Ordinary Course.*—In *Foy v. First National Bank*,⁶⁰ the key issue was whether a dealer-buyer of conversion vans from a van converter-seller was a buyer in the ordinary course of business so as to take free of perfected security interests in those vans held by a bank that had financed the seller.⁶¹ Determining factors were whether the buyer was acting in good faith and whether his method of purchase was in the ordinary course.⁶² Resolution of the issue raised the question of whether the definition of good faith stated in Article 2 as being applicable to merchants ("honesty in fact and observance of reasonable commercial standards of fair dealing in the trade"⁶³), also applied to Article 9.

55. See WHITE & SUMMERS, *supra* note 14, § 25-19.

56. See *Vanek v. Indiana Nat'l Bank*, 540 N.E.2d 81, 83 (Ind. Ct. App. 1989); *Hall v. Owen County State Bank*, 175 Ind. App. 150, 370 N.E.2d 918 (1977).

57. 540 N.E.2d 81 (Ind. Ct. App. 1989).

58. The debtor in this instance was the guarantor of a corporate debt. Upon default, the guarantor has the same rights as the debtor under the U.C.C. See *Vanek*, 540 N.E.2d at 82; *McEntire v. Indiana Nat'l Bank*, 471 N.E.2d 1216 (Ind. Ct. App. 1984); WHITE & SUMMERS, *supra* note 14, § 25-12.

59. *Vanek*, 540 N.E.2d at 83.

60. 868 F.2d 251 (7th Cir. 1989).

61. U.C.C. § 9-307(1) states that a buyer in the ordinary course of business "takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence."

62. U.C.C. § 1-201(9) defines "buyer in the ordinary course" as:

a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker.

U.C.C. § 1-201(19) defines "good faith" as "honesty in fact in the conduct or transaction concerned," whereas § 2-103(1)(b) defines it in the case of a merchant as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

63. U.C.C. § 2-102(1)(b).

Under the financing agreement between the seller and his bank, the bank would retain certificates of origin of financed vans and would release them only as the vans were sold. The seller would either pay the bank in advance or would issue a trust receipt in exchange for each certificate and would pay as soon as his buyer paid him.⁶⁴ In fact, he was selling the vans without immediately delivering the certificates of origin to his buyer and was retaining the proceeds for his own use. The explanation he gave his buyer for the delay in forwarding the certificates was that the blanket agreement between the buyer and seller provided that the seller might repurchase the vans from the buyer. The seller did not tell the buyer that the bank had the certificates, but instead said that he had them in his desk. The buyer's own financier did not require that he turn over the certificates as security. Ultimately, the seller's scheme collapsed, and the bank demanded that in order for the buyer to obtain the certificates of title to ten vans in his possession (and for which he had paid the seller), the buyer had to pay off the seller's loans from the bank on those vans. He refused and brought this suit to recover the certificates free and clear of the bank's claim.

Writing for the court, Judge Posner first stated that whether the buyer was acting in the ordinary course was a question of fact on which the district court, which had found for the buyer, could be reversed only if its finding was clearly erroneous under rule 52(a) of the Federal Rules of Civil Procedure.⁶⁵ He continued that there were no facts on the record that raised suspicion about the buyer's failure to insist on the prompt delivery of the certificates. Furthermore, although other courts are divided on whether the definition of good faith found in Article 2 should be applied to Article 9, Indiana courts have not yet decided the issue.⁶⁶ The court was reluctant to import the definition in Article 2 into Article 9 when there already was an Article 1 definition applicable to the entire Code.⁶⁷ However, the court stated that if "there are grounds for suspicion that a security interest is being imperiled," the ordinary course of business requirement of section 9-307(1) requires the buyer to act reasonably, thus imparting some of the elements of the Article 2 definition into this part of Article 9 in any event.⁶⁸

On the record before it, the court found no basis for concluding that the buyer acted unreasonably. If anyone acted unreasonably, it was the bank, which both conducted its periodic audits of the seller only after announcing them, thereby enabling him to cover up his misconduct,

64. *Foy*, 868 F.2d at 253.

65. *Id.* at 254.

66. *See supra* notes 60-63 and accompanying text.

67. *Foy*, 868 F.2d at 256.

68. *Id.*

and failed to call dealers to whom the seller said he had entrusted (not sold) vans.

Almost as a postscript, the court imposed sanctions on the buyer for his frivolous request and argument that the bank itself should be sanctioned for filing the appeal. Although the bank lost the appeal, its appeal was not frivolous, and "a frivolous request for sanctions is itself sanctionable."⁶⁹

3. *Priority of Mechanics' (Artisans') Liens over Perfected Security Interests.*—Confronting the issue for the first time, the Indiana Court of Appeals, in *Church Bros. Body Service v. Merchants National Bank and Trust Co.*,⁷⁰ held that the statutory, non-possessory lien of a mechanic who had repaired an automobile has priority over a bank's prior perfected Article 9 security interest. The court therefore reversed the entry of summary judgment for the bank and directed the entry of summary judgment for the mechanic.

The security agreement between the car owner-debtor and the bank not only prohibited the owner from creating any adverse lien or security interest in the car without the bank's written consent, but also required him to keep the car in good order and to repair any damage within thirty days or be in violation of the agreement.⁷¹ Following an accident, Church Brothers, a mechanic-body shop, performed repairs costing approximately \$5,400 and released the car to the owner without receiving payment. When the owner failed to pay on later demand, the body shop filed a Notice of Intention to File Mechanic's Lien, a lien created by statute in favor of mechanics who repair motor vehicles.⁷² When the owner later failed to make payments on his automotive loan, the bank notified him of its intent to repossess and sell the car. The mechanic sought a declaratory judgment in its favor and an injunction against the sale. Ultimately, the car was sold and the amount of the repair bill put in escrow. The trial court granted the bank's motion for summary judgment and awarded it the escrow amount.

The bank contended that the priority rules of Article 9 applied, and gave its perfected security interest priority over the mechanic's lien. The court disagreed. Section 9-104(c) expressly excludes from the scope of Article 9 liens "given by statute or other rule of law for services or materials except as provided in [Section 9-310] on priority of such liens." Section 9-310 speaks only of possessory mechanics' liens and gives them

69. *Id.* at 258. The buyer was required to pay the part of the bank's attorney's fees incurred in defending the buyer's request for sanctions.

70. 559 N.E.2d 328 (Ind. Ct. App. 1990).

71. *Id.* at 329.

72. See IND. CODE §§ 32-8-31-1 to -6 (1988).

priority over perfected security interests.⁷³ It does not address the priority of non-possessory, statutory liens. The court concluded that the priority issue on these facts would be determined by the common law, not the Code.

Under ordinary circumstances, in the absence of a statutory resolution of priority disputes, common law gave priority to a prior recorded mortgage or conditional sales contract.⁷⁴ However, when the repairs benefit the mortgagee by preserving the chattel, the repairs were necessary to continued use of the chattel in the mortgagee's interest, or the mortgagee knew or should have known of the repairs, the mechanics' lien took priority, and the priority did not depend on possession.⁷⁵

In this case, the security agreement required the owner to repair the car in the event of damage. In essence, he was authorized by and acting on behalf of the bank when he did so. The repairs preserved the collateral and benefitted the bank. The lien asserted by the mechanic therefore was an exception to the usual common law rule of priority in favor of recorded liens and took priority over the bank's security interest.

D. Contracts

1. Guaranty and Suretyship.—

a. The statute of frauds

The statute of frauds, which requires a written, signed memorandum in order to enforce the promise of one person to answer for the debt of another,⁷⁶ is alive and well. In *National By-Products, Inc. v. Ladd*,⁷⁷

73. U.C.C. § 9-310:

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

74. *Church Bros.*, 559 N.E.2d at 331 (citing, *inter alia*, *Champa v. Consolidated Fin. Corp.*, 231 Ind. 580, 588, 110 N.E.2d 289, 292 (1953); *Personal Fin. Co. v. Flecknoe*, 216 Ind. 330, 334, 24 N.E.2d 694, 696 (1940)).

75. *Church Bros.*, 559 N.E.2d at 331 (citing *Flecknoe*, 216 Ind. at 338-39, 24 N.E.2d at 697-98).

76. IND. CODE § 32-2-1-1 (1988) states:

No action shall be brought . . . to charge any person, upon any special promise, to answer for the debt, default or miscarriage of another . . . unless the promise, contract or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized . . .

77. 555 N.E.2d 518 (Ind. Ct. App. 1990).

the wife of one of the officers of the corporate debtor promised orally to pay a creditor's claim in installments of \$500 per month from her own funds in order to avoid having her husband appear in court. After she sent the first check, the creditor sent a letter acknowledging receipt, stating the amount of its judgment, and reciting that the amount would be paid off in monthly installments of \$500 each. The wife later sent a second check with a letter stating that the check should be credited to the debtor's account. Subsequently, the debtor decided to go out of business and to liquidate its assets. The creditor filed suit after the wife (and her husband) failed to make any further monthly payments.

The trial court granted summary judgment for the defendants based upon the statute of frauds. The only writings signed by the wife were the two checks and the letter directing that the second check be credited to the debtor corporation's account. The court first stated the general rule:

A memorandum, to be sufficient within the meaning of the Statute of Frauds, must set out the contract with such reasonable certainty that its terms may be understood from the writing itself, without recourse to parol proof. . . . A written contract which leaves some essential terms thereof to be shown by parol, is only a "parol contract" not enforceable under the Statute of Frauds.⁷⁸

The court concluded that the writings in this case did not evidence a promise to pay the balance of the debtor's account. Rather, they constituted nothing more than a volunteer's promise to pay \$500 toward that account.

A similar result was reached in *Strutz v. Robinson*,⁷⁹ except that there was not any writing that even arguably satisfied the statute. In *Strutz*, the attorney for a trust engaged an accountant to render services in connection with trust litigation, the expenses for which were apparently borne by the beneficiary. When the accountant sued the beneficiary for his fee, the trial court found in the accountant's favor because the beneficiary had engaged the attorney, orally authorized employment of the accountant, and promised to pay his fee. Although the court of appeals expressed sympathy for the plight of the accountant who had rendered valuable services to the trust, it reversed the trial court because the statute of frauds requires a writing to support enforcement of a guaranty, and there was none here. The dissenting judge expressed that he would agree if the trust had hired the accountant. However, he read

78. *Id.* at 520 (citations omitted).

79. 558 N.E.2d 896 (Ind. Ct. App. 1990).

the trial court's determination as a finding that the actual employer of both the attorney and the accountant was the beneficiary.

b. Modification of guaranty and discharge

Ordinarily, any material change in an underlying obligation will discharge a guarantor who has not consented to the change. In *United States v. Stump Home Specialties Manufacturing, Inc.*,⁸⁰ the court upheld a modification from a fixed interest rate to a variable interest rate as having been agreed to in the guaranty agreement and as being supported by consideration. When the guarantors signed the guaranty agreement, the loan agreement provided for interest at a fixed 9.5%. The guaranty agreement also authorized the lending bank, without notice to the guarantors, to modify any terms or the rate of interest, but not to increase the principal. The loan itself was to be guaranteed by the Small Business Administration (SBA), which had previously approved a fixed interest rate. The bank's loan committee, however, preferred a variable rate. Therefore, the principal debtor signed two notes, one at 9.5% and another at 1.5% over the lending bank's prime rate. The SBA ultimately approved the variable rate but insisted that it be set at 1.5% over New York prime. The loan agreement was amended to reflect the change and was approved by two of the debtor's officers, who were also guarantors. The remaining five guarantors were never notified of the change. By the time of the principal debtor's default, New York prime had reached 16%, thereby making the interest rate under the amended agreement 17.5%.

Upon the debtor's default, the bank assigned the loan to the SBA, which brought suit against the guarantors. The guarantors raised two basic defenses: that the modification without notice and consent discharged them from liability, and that there was no consideration for the modification. On the first issue, the court ruled that two officer-guarantors had notice and did consent when they signed the amending agreement. In response to the bank's argument that they had waived notice of changes in their guaranty, the remaining guarantors contended that the waiver expressly excluded changes in the principal amount of the loan and that a doubling of the interest rate was the equivalent of increasing the principal. The court, speaking through Judge Posner, rejected this argument and explained the policy differences underlying changes in principal and changes in interest. An increase in principal benefits both the lender and the borrower, thereby creating an incentive for those two parties to conspire against the guarantors and to increase

80. 905 F.2d 1117 (7th Cir. 1990).

the guarantors' risk. However, an increase in the interest rate is a cost to the borrower, thereby reducing the incentive on the part of the borrower to conspire with the lender against the guarantors.⁸¹

Judge Posner apparently would abolish the requirement of consideration for contract modifications and would substitute a determination of whether the modification was coerced.⁸² It was not necessary to do so, however, because the court found consideration. The issue reduced itself to whether there was consideration for the borrower's agreement to substitute the variable rate for the fixed rate. The court concluded that what the guarantors actually agreed to guarantee was a contingent loan agreement, subject to approval by the bank's loan committee and the SBA. In order to eliminate the contingency and to firm up the agreement, the borrower had to agree to the variable rate. This firming up was consideration for the change in interest rate.⁸³ Moreover, by the time the New York prime rate entered into the agreement, the borrower already had agreed to a variable rate, and, according to the court, there was no difference ascertainable from the record between measuring the rate against the bank's own prime rate and the New York prime rate.⁸⁴

2. *Promissory Estoppel*.—Two recent cases demonstrate that the doctrine of promissory estoppel is a viable basis for the enforcement of promises even when there is no apparent contract in the traditional sense of offer and acceptance.

The plaintiff in *Hoo Siong Chow v. TransWorld Airlines*,⁸⁵ had made arrangements through a travel agent to fly to Singapore via TransWorld Airlines (TWA) through St. Louis to San Francisco, where he was to change to a flight on Singapore Airlines (SA). Because of apparent mechanical and scheduling problems, the flight was delayed in St. Louis for several hours, but TWA personnel assured him that if he missed his scheduled flight to Singapore, TWA would make new arrangements. He missed his Singapore flight by several minutes, and TWA agents said he would be housed overnight and would be booked on a priority list for the next SA flight. When he called SA the next morning to check his flight, SA told him that no arrangements had been made.

81. *Id.* at 1121.

82. *See Stump Home Specialties*, 905 F.2d at 1121-22. As Judge Posner points out, this is consistent with § 2-209(1) of the U.C.C., which eliminates the requirement of consideration when the parties agree to modify their contract. The Code does not apply to this loan transaction, however.

83. *See Stump Home Specialties*, 905 F.2d at 1123.

84. *See id.* at 1123-24. In fact, there was nothing in the record to show that there was a difference between the two prime rates. *Id.* at 1120.

85. 544 N.E.2d 548 (Ind. Ct. App. 1989).

TWA then reassured him that arrangements would be made. After several more hours, TWA had not made any arrangements and told him that he was "on his own." Because SA had no seats remaining in economy class, plaintiff was required to purchase a business class seat for an additional \$928, for which plaintiff brought suit against TWA.

The trial court found that the facts "fit squarely" within the doctrine of promissory estoppel but denied relief because plaintiff failed to prove that if TWA had fulfilled its promises, he would have had a seat in economy class.

The court of appeals observed that promissory estoppel, as embodied in section 90 of the Restatement (Second) of Contracts, has been applied in Indiana both to charitable subscriptions, for which it was originally developed, and to commercial settings.⁸⁶ However, the court was unable to find a decision involving "this fairly commonplace set of facts."⁸⁷ Nevertheless, the court held that the facts fit squarely within the doctrine: TWA personnel made promises that they should have realized would induce plaintiff not to call SA himself and such reliance was reasonable.⁸⁸

The court also held that the trial court's limitation on the applicability of promissory estoppel was in error. "The purpose of Section 90 is to make a promise binding even though consideration is lacking 'in the sense of something that is bargained for and given in exchange.'"⁸⁹ There is no causation element engrafted on the rule.

A similar result was reached in *Medtech Corp. v. Indiana Insurance Co.*,⁹⁰ in which the plaintiff corporations purchased through an agent an insurance policy covering inventory, equipment, and supplies. While the roof of the corporate premises was being repaired, the plaintiffs sustained rain damage. The agent prepared and forwarded to the insurance company a property loss notice and assured the plaintiffs that the notice would preserve their claims under the policy and would protect them if the roofer failed to compensate them for their loss, that the insurance company would contact them if any additional information was needed, and that he would take any steps necessary to process the

86. *Id.* at 549. Section 90, as quoted by the court, states: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90 (1984). The actual language is "forbearance on the part of the promisee or a third person" *Id.*

87. *Hoo Siong Chow*, 544 N.E.2d at 549.

88. *Id.*

89. *Id.* at 550 (quoting *Pepsi-Cola General Bottlers, Inc. v. Woods*, 440 N.E.2d 696 (Ind. Ct. App. 1982) (quoting *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958))).

90. 555 N.E.2d 844 (Ind. Ct. App. 1990).

claims. When the roofer's insurance company ultimately refused to pay, plaintiffs sought to recover under their own policy. Defendant insurance company denied the claims because plaintiffs had missed the time deadlines specified in the policy for filing proofs of loss and for bringing suit.

Plaintiffs filed suit against the insurance company, the agent, and his agency based on promissory estoppel and fraud. The trial court granted summary judgment in favor of all defendants. The appeal related only to the agent and his agency-employer.

At the outset of its analysis, the court stated that if promissory estoppel applied to the facts of the case, the grant of summary judgment in favor of the agent and the agency for which he worked was improper. The court rejected the defendants' arguments that the agent's assurances were merely opinions and held that they constituted promises on which plaintiffs could have relied in not pursuing their claims against the insurance company and which could support plaintiffs' claim for relief against the agent and agency based on promissory estoppel.⁹¹

In examining the opinions in both of these cases, it is important that the courts do not speak of promissory estoppel as a substitute for consideration in the formation of an enforceable contract, breach of which is the basis of plaintiffs' cause of action. Rather, the courts create a separate cause of action based exclusively on promissory estoppel, that is, the enforceability of a promise that causes reliance to the detriment of the promisee, a cause of action far removed from the traditional, early common law idea of contractual obligation supported by consideration or bargain.

3. *Third-Party Beneficiaries.*—The rights of third-party beneficiaries under contracts to which they are not parties continue to be major issues before the courts. Two recent cases, *Barth Electric Co. v. Traylor Bros.*⁹² and *Tonn & Blank, Inc. v. Board of Commissioners of LaPorte County*,⁹³ involved suits by construction contractors for damages arising from breaches between other contractors and the owner-builder of a facility. Both cases involved terms found in the standard contract of the American Institute of Architects (AIA), interpretation of which previously had not been before the court.

In *Barth*, each of the contractors, such as general, electrical, and mechanical, executed the same AIA Standard Form of Agreement. Several of the standardized provisions required cooperation between the signing contractor and other contractors on the job.⁹⁴

91. *Id.* at 847. The court reached a similar conclusion on the issue of fraud.

92. 553 N.E.2d 504 (Ind. Ct. App. 1990).

93. 554 N.E.2d 827 (Ind. Ct. App. 1990).

94. The court placed particular emphasis on the following provisions:

Barth, the electrical contractor, claimed it was a third-party beneficiary of each of the standard contracts and sued the general contractor and the mechanical contractor for damages caused by their schedule delays and deviations. The trial court granted defendants' motions to dismiss.

The court of appeals recognized that the sole issue in the case was whether the plaintiff was a third-party beneficiary of the other contracts. The court stated that a party claiming third-party beneficiary status must show: (1) a clear intent of the parties to the contract to benefit the third party; (2) a duty on one of the parties to confer that benefit; and (3) that performance of the contract is necessary to confer the benefit.⁹⁵ Defendants relied on *Reed v. Adams Steel & Wire Works*,⁹⁶ in which the court denied third-party beneficiary status. The *Barth* court noted that *Reed* interpreted the provision in that case as intending to assure the owner that the job would be completed on time rather than to give third-party beneficiary status. Moreover, the *Reed* contract contained nothing like the mutual responsibility clause in the *Barth* contracts.⁹⁷

Although courts in other jurisdictions are divided on whether the standard AIA contract grants third-party beneficiary rights, the trend is

6.2 MUTUAL RESPONSIBILITY

6.2.1 The Contractor shall afford the Owner and separate contractors reasonable opportunity for the introduction and storage of their materials and equipment and the execution of their Work, and shall connect and coordinate his work with theirs as required by the Contract Documents.

6.2.2 If any part of the Contractor's Work depends for proper execution or results upon the work of the Owner or any separate contractor, the Contractor shall, prior to proceeding with the Work, promptly report to the Architect any apparent discrepancies or defects in such other work that render it unsuitable for such proper execution and results

6.2.3 Any costs caused by defective or ill-timed work shall be borne by the party responsible therefor.

Barth, 553 N.E.2d at 505. The remaining two sections quoted by the court related to wrongful damage by the contractor to work or property of the owner or other contractors, and an indemnification of the owner against claims by other contractors arising from defalcations by the contractor.

95. *Barth*, 553 N.E.2d at 506.

96. 57 Ind. App. 259, 106 N.E. 882 (1914). In *Reed*, the provision in question stated:

All the materials and labor to be furnished by the second party [contractor], not governed by the foregoing schedule, shall be furnished at such time as may be for the best interest of all contractors concerned, to the end that the combined work of all may be fully completed on contract time.

Id. at 263, 106 N.E. at 883-84.

97. *Barth*, 553 N.E.2d at 506. It should also be noted that *Reed* was decided in 1914, fairly early in the historical development of the concept of third-party beneficiary rights. See E. FARNSWORTH, *CONTRACTS* § 10.2 (2d ed. 1990); J. MURRAY, *MURRAY ON CONTRACTS* § 129 (3d ed. 1990).

in favor of such rights.⁹⁸ Referring to one of those cases, the court quoted six factors that support the trend:

- (1) the construction contracts contain substantially the same language; (2) all contracts provide that time is of the essence; (3) all contracts provide for prompt performance and completion; (4) each contract recognizes other contractors' rights to performance; (5) each contract contains a non-interference provision; and (6) each contract obligates the prime contractor to pay for the damage it may cause to the work, materials, or equipment of other contractors working on the project.⁹⁹

Based on these factors, the court ruled that the provisions of the AIA contract did indeed support third-party beneficiary rights.

Three weeks after the decision in *Barth*, the court decided *Tonn & Blank*,¹⁰⁰ in which the identical mutual responsibility clause as in *Barth* was at issue in determining third-party beneficiary rights of a contractor whose work had been delayed by another contractor.¹⁰¹ Again the trial court had granted defendants' motions to dismiss, and again defendants relied on the 1914 *Reed* case. Without referring to *Barth*,¹⁰² the court distinguished *Reed* in the same way; namely, that the clause there intended only to assure completion on time, but that the contracts signed in *Tonn & Blank* did intend to confer third-party beneficiary rights.¹⁰³

In *Hermann v. Frey*,¹⁰⁴ a case of particular interest to practitioners, the court held that an attorney may be sued for malpractice by someone who is not his client if the plaintiff is a known third-party beneficiary of the agreement with his client. In this case, a widow retained an attorney to bring a medical malpractice action on behalf of her late husband. The attorney opened an estate and the widow was named administratrix.

In the administrative proceeding, the medical panel determined that one of the doctors had not been negligent, and the attorney did not name him as a defendant in the later medical malpractice lawsuit. After a verdict for the named defendants, the widow, in her own name, sued the attorney for malpractice because he had failed to join the exonerated

98. *Barth*, 533 N.E.2d at 507 (citing *Moore Constr. Co. v. Clarksville Dep't of Elec.*, 707 S.W.2d 1, 10 (Tenn. Ct. App. 1986), and cases cited therein).

99. *Id.*

100. 554 N.E.2d 827 (Ind. Ct. App. 1990).

101. The court cites only 6.2.1, quoted *supra* note 94, but it is reasonable to assume that the parties had signed the standard AIA form. *Tonn & Blank*, 554 N.E.2d at 829.

102. The author of the *Barth* opinion served on the panel in *Tonn & Blank*.

103. *Tonn & Blank*, 4 N.E.2d at 829.

104. 537 N.E.2d 529 (Ind. Ct. App. 1989).

doctor. The trial court granted the attorney's motion for summary judgment because he had been engaged to act on behalf of the estate and its administratrix, not on behalf of the widow as an individual.¹⁰⁵

The court of appeals reversed and remanded. Acknowledging that the well-established majority rule is that an attorney is not liable to third parties for professional negligence in the absence of privity of contract, fraud, or collusion, the court recognized that the trend is against the strict privity requirement either on a third-party beneficiary theory or a balancing of factors test.¹⁰⁶

In Indiana, the requirement of privity in similar cases is eroding, and the negligent drafter of a will may be liable to a known third-party beneficiary.¹⁰⁷ In this case, the widow met the requirements for being a third-party beneficiary because she was her husband's only surviving heir, she had retained the attorney to represent the estate, and she was entitled to his professional advice. Thus, she stated a cause of action.¹⁰⁸ The court expressly did not decide whether the defendant attorney had in fact committed malpractice by failing to join the exonerated doctor.

4. *Mistake*.—Lest lawyers and law students think that the old classics are of no current importance, *Rose of Aberlone*, the barren cow,¹⁰⁹ once again demonstrates her importance in the law of mistake. In *Wilkin v. 1st Source Bank*,¹¹⁰ the bank, as executor of a decedent's estate, agreed to sell decedent's house. At the time of her death, decedent was the owner of many works of art by her late, internationally famous husband, all of which were to be sold and the proceeds distributed to her family.¹¹¹ "A large number of these works of art were located in her home at the time of her death."¹¹² When the buyers of the house took possession, they complained that the premises were cluttered and would require substantial cleaning. The bank proposed that either it would arrange for a trash hauler to clean the premises or the buyers could clean out the premises and keep any items they wished. According

105. *Id.* at 530.

106. *Id.* at 531.

107. *Id.* (citing *Walker v. Lawson*, 526 N.E.2d 968 (Ind. 1988))

108. *Id.* at 531.

109. *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887).

110. 548 N.E.2d 170 (Ind. Ct. App. 1990).

111. Decedent was the widow of Ivan Mestrovic, artist and sculptor, whose works are at the Art Institute of Chicago, Brooklyn Museum, Syracuse Museum of Fine Arts, London's Victoria & Albert Museum and Tate Gallery, among others. See *Wilkin*, 548 N.E.2d at 171 n.1; Brief for Appellee at 7, *Wilkin*, 548 N.E.2d 170 (No. 71A03-8908-CV-334); see also The Mestrovic Gallery of the Snite Museum at the University of Notre Dame.

112. Brief for Appellee, Statement of the Case at 2, *Wilkin*, 548 N.E.2d 170 (No. 71A03-8908-CV-334).

to the bank, the clutter, characterized as "junk" or "stuff," consisted of "papers, books, underwear, purses, hats, clothing, a walker, an old bed, two air conditioning units, one of which did not operate, boxes of books and an old television."¹¹³ Neither party realized that included in this "junk" were eight drawings and a piece of sculpture, all by decedent's husband and all apparently quite valuable. The drawings were found in a bedroom closet, in a tube wrapped with a dry cleaner's plastic bag. The sculpture, found a year later, was in a crate in the garage.

The probate court ruled that because neither party knew of the existence of these items, there was no meeting of the minds and, consequently, no contract of sale of the items, which remained part of the estate. The court of appeals agreed and restated the rule: "Where both parties share a common assumption about a vital fact upon which they based their bargain, and that assumption is false, the transaction may be avoided if because of the mistake a quite different exchange of values occurs from the exchange of values contemplated by the parties."¹¹⁴ The court observed that, as in *Sherwood v. Walker*,¹¹⁵ the parties presupposed certain facts that were false, namely, that the premises were cluttered with trash. Neither suspected that there were any works of art amidst the clutter. Thus, quoting *Sherwood*, the court stated that "[t]he mistake was not of the mere quality of the animal, but went to the very nature of the thing."¹¹⁶ The resulting gain to the buyers and loss to the bank were not contemplated when the parties agreed that the buyers would clean the premises.¹¹⁷

This reasoning and the application of a "difference in kind" test has been criticized as "specious and artificial,"¹¹⁸ and as "overly metaphysical."¹¹⁹ The more accurate statement of the applicable rule is set forth in the Restatement (Second) of Contracts:

Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party *unless*

113. *Id.* Statement of Facts at 6.

114. *Wilkin*, 548 N.E.2d at 172 (citing J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 9-26 (3d ed. 1987))

115. 66 Mich. 568, 33 N.W. 919 (1887).

116. *Wilkin*, 548 N.E.2d at 172 (quoting 66 Mich. at 577, 33 N.W. at 923)

117. *Id.*

118. See E. FARNSWORTH, *supra* note 97, § 9.3, at 689-90.

119. See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 9-26, at 383 (3d ed. 1987).

he bears the risk of the mistake under the rule stated in section 154.¹²⁰

Thus, the issue is not only whether the parties were mistaken as to the existence of the artwork, but also whether the bank bore the risk that something of value might be found in the "junk."¹²¹ The resolution of this issue in turn requires a determination whether the parties were laboring under a "conscious ignorance" of the facts, as in one of the other classic cases, *Wood v. Boynton*.¹²²

In *Wood*, the buyer and seller both thought, but did not really know, that the gem stone being sold might be a topaz and valued it as such. In fact the stone was a diamond. The court refused to compel the buyer to return the stone to the seller because there was conscious uncertainty about the stone. The risk that it was worth more than the price paid was on the seller; the risk that it was worth less was on the buyer. In a more recent case, a Washington court refused to compel the return of money found in the locked drawer of a safe sold at auction because the auctioneer manifested the intention of selling the safe and its contents despite conscious ignorance of the safe's contents.¹²³ A similar case in Illinois ruled that the buyer of a locked filing cabinet was required to return a certificate of deposit found therein because the seller and buyer understood the sale to be only of used office furniture, not of its contents as well.¹²⁴

As stated by Professor Corbin with respect to *Sherwood* and *Wood*:

In these cases, the decision involves a judgment as to the materiality of the alleged factor, and as to whether the parties made a definite assumption that it existed and made their agreement in the belief that there was no risk with respect to it. Opinions are almost sure to differ on both of these matters, so that decisions must be, or appear to be, conflicting. The court's judgment on each of them is a judgment on a matter of fact, not a judgment as to law. No rule of thumb should be constructed for cases of this kind.¹²⁵

Consequently, the result in *Wilkin* may well be the same after a factfinder considers questions in addition to whether both parties knew of the

120. RESTATEMENT (SECOND) OF CONTRACTS § 152(a) (1981).

121. See E. FARNSWORTH, *supra* note 97, § 9.3, at 690-91; J. MURRAY, *supra* note 97, § 91.D.

122. 64 Wis. 265, 25 N.W. 42 (1885); see E. FARNSWORTH, *supra* note 97, § 9.3, at 690; J. MURRAY, *supra* note 97, § 91.D.

123. See *City of Everett v. Sumstad's Estate*, 95 Wash. 2d 853, 631 P.2d 366 (1981).

124. See *Michael v. First Chicago Corp.*, 139 Ill. App. 3d 374, 487 N.E.2d 403 (1985).

125. A. CORBIN, CORBIN ON CONTRACTS § 605 (one vol. ed. 1952).

existence of the artwork. For example, is it not reasonable to assume that in the home of the widow of a famous artist, clutter might include some of his works? Is it not reasonable that a crate in the garage might contain something of value? Why did the bank, which was under a duty to deliver clean premises, offer to let the buyers keep whatever they found if the bank assumed that there was nothing of value and saved expense by so offering? Was the bank not taking the risk that something of value might be found? Why did the buyers agree to clean out the clutter themselves rather than have the bank pay to have it done if the buyers assumed that there was nothing of value in the clutter that they might want to keep? Were they assuming that they might indeed find something of value? Was the bank's offer of all the clutter actually like the offer of a surprise package: the buyer takes a chance on winning a prize or getting nothing? All of these questions relate to what risks, if any, either party was assuming.

5. *Accord and satisfaction*.—In reviewing the historical rule that the agreement of a creditor to take less than the amount due on a liquidated debt is unenforceable for lack of consideration (the old pre-existing duty rule), the court of appeals indicated that a substantial relaxation of the rule is appropriate. In *Chesak v. Northern Indiana Bank & Trust Co.*,¹²⁶ the bank agreed to accept two payments of \$500 each in payment of a long overdue debt of approximately \$6,100. When the debtors failed to make the second payment, the bank sued for the full amount of the debt.

In their appeal from the trial court's grant of summary judgment in favor of the bank, the debtors argued that the bank's agreement to take \$1,000 and acceptance of the first \$500 constituted an accord and satisfaction which precluded suit on the original debt. The ultimate conclusion of the court was that the offer of an accord and satisfaction is the offer of a unilateral contract that may be accepted only by full performance (the satisfaction).¹²⁷ Since the debtors never fully performed by paying \$1,000 within the time allowed, there was no accord and satisfaction to bar suit for the original amount due.

This analysis should have resolved the matter. Nevertheless, the court apparently concluded it was important to clarify the applicable rules of accord and satisfaction and the effect of the pre-existing duty rule. In doing so, it first observed that the pre-existing duty rule is based on an historically restrictive definition of consideration that has fallen into disfavor. The court continued:

126. 551 N.E.2d 873 (Ind. Ct. App. 1990).

127. *Id.* at 876.

In cases such as this where the accord allows the creditor to recover in cash promptly and without collection proceedings a portion of a long overdue liquidated debt and thereby clear its books of the account, we cannot say that the creditor has received no consideration. That is, the creditor has determined that the benefits of such an arrangement outweigh the costs, both direct and indirect, of pursuing the claim to judgment and attempting to collect thereon. Those benefits are sufficient consideration to support an accord and, indeed, would have been sufficient here to bar [the bank] from suing on the note had this accord been satisfied.¹²⁸

Although dictum, these observations indicate that the court is willing to move toward a more realistic approach to the issue of consideration. However, each case must be determined on its own facts. Courts should avoid overly liberal application of this approach to past due obligations lest sharp business people adopt the regular practice of not paying their debts on time in order to negotiate and pay lesser amounts to their creditors.

128. *Id.*

Recent Developments in Indiana Civil Procedure

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I. INTRODUCTION

During the survey period, the Indiana Supreme Court and Indiana Court of Appeals issued several significant decisions that contribute to the development of Indiana civil procedure. By this time, all Indiana practitioners should be aware of the recent changes in all areas of the Indiana Rules of Procedure for both trial and appellate practice. Because these changes already have received attention by commentators,¹ they will not be discussed in detail here. Instead, this Article will focus on recent Indiana case law that construed the rules and procedural statutes. Significant areas of development that will be discussed include limitation of actions, challenges to personal and subject matter jurisdiction, notice to opposing parties, discovery, pleading and practice under the Comparative Fault Act, and relief from judgment.

II. LIMITATION OF ACTIONS

The Indiana appellate courts decided several important issues concerning statutes of repose and limitations during the survey period. The most controversial of these was *Covalt v. Carey Canada, Inc.*,² in which the supreme court, in a 3-2 decision, construed Indiana's statute of repose for product liability actions based on theories of negligence or strict liability.³ Pursuant to a question certified by the Seventh Circuit

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1. See, e.g., Funk, *Survey of Recent Developments in the Indiana Rules of Trial Procedure in Civil Matters*, 23 IND. L. REV. 241, 257-59 (1990); Harvey, *Rules, Rulings for the Trial Lawyer*, 33 RES GESTAE 530 (1990); Harvey, *Rules, Rulings for the Trial Lawyer*, 32 RES GESTAE 480 (1989); Mulvaney, *Fundamental Changes in Indiana Appellate Procedure or What Happened to Motion to Correct Error?*, 32 RES GESTAE 472 (1989).

2. 543 N.E.2d 382 (Ind. 1989). *Covalt* was discussed in the last survey issue, see Rosiello & Klein, *Survey of Recent Developments in Indiana Products Liability Law*, 23 IND. L. REV. 617, 633-40 (1990), and sharply criticized. However, a discussion of the case is included in this Article for comparison purposes and to advise attorneys of opportunities that the holding presents for future cases.

3. IND. CODE § 33-1-1.5-5 (Supp. 1990). The statute provides as follows:
Statute of limitations

Sec. 5(a) This section applies to all persons regardless of minority or legal

Court of Appeals,⁴ the court held that the statute of repose, which requires a plaintiff to file an action within ten years after delivery of the product to the initial user or consumer, does not apply to cases in which the plaintiff's injury is caused by a disease that may have been contracted as a result of protracted exposure to an inherently dangerous foreign substance.⁵ In such cases, the court held, the action must be brought within two years after the plaintiff discovers, or should have discovered, the disease and its cause. This discovery rule was announced in *Barnes v. A.H. Robins Co.*⁶ for determining when a cause of action for product liability accrues.

The court specifically distinguished *Dague v. Piper Aircraft Corp.*,⁷ which held that in product liability actions, the legislature intended to create an outer limit of ten years from the date the product was first placed into the stream of commerce within which to file suit.⁸ This distinction exists because asbestos is an inherently dangerous substance which causes a disease that does not manifest itself until many years after entering the body, whereas *Dague* involved a one-time occurrence resulting in immediate injury.⁹ The most notable reason for the court's decision to make an exception to the bar created by the statute of repose in cases involving asbestos-related diseases is that "the primary purpose of statutes of repose, that of recognizing the improvements of product design and safety that come with time, is not served in cases involving asbestos and its related diseases"¹⁰ because asbestos will not become any safer with time. The court also noted, for comparison purposes, as it had in *Barnes*, that the legislature provided for a discovery rule for

disability. Notwithstanding I.C. 34-1-2-5, it applies in any product liability action in which the theory of liability is negligence or strict liability in tort.

(b) Except as provided in section 5.5 of this chapter, a product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer. However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

Id.

4. *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434 (7th Cir. 1988).

5. *Covalt*, 543 N.E.2d at 385.

6. 476 N.E.2d 84 (Ind. 1985).

7. 275 Ind. 520, 418 N.E.2d 207 (1981).

8. *Id.* at 525, 418 N.E.2d at 210.

9. *Covalt*, 543 N.E.2d at 386. In *Dague*, the plaintiff's husband died two months after his plane crashed. The crash occurred more than ten years after the plane was first placed in the stream of commerce. *Dague*, 275 Ind. at 522, 418 N.E.2d at 209.

10. *Covalt*, 543 N.E.2d at 386 (citing *Knox v. A C & S, Inc.*, 690 F. Supp. 752, 760 (S.D. Ind. 1988)).

workers exposed to radiation who bring an action pursuant to the Occupational Diseases Act.¹¹

The majority opinion in *Covalt* produced two vigorous dissenting opinions by Chief Justice Shepard and Justice Dickson.¹² Both dissenters found that the statute is unambiguous and clearly requires courts to bar any product liability actions sounding in strict liability or negligence that are not brought within the ten-year period of repose.¹³ They contended that the majority was improperly rewriting the statute by creating an exception to the repose period for asbestosis victims.

Indiana lawyers should note that the holding of the *Covalt* majority has been superceded by statute.¹⁴ For asbestos-related actions, the legislature expressly provided for an exception to the ten-year repose period and applied a discovery rule instead.¹⁵ Therefore, *Covalt* is not necessarily significant for its holding as it relates specifically to asbestosis claims. The importance of *Covalt* is its potential future applicability to claims involving similar foreign substances that cause illness long after being introduced into the body. The majority acknowledged this possibility when it reasoned that “[a]sbestos *and naturally occurring substances like it* are not subject to design and safety improvements.”¹⁶ The other aspect of *Covalt* that lawyers should note is Justice Dickson’s dissenting opinion, which suggests a willingness to re-examine the statute of repose for violations of the Indiana Constitution. Although noting that *Dague* held the statute did not violate Article I, section 12,¹⁷ this opinion suggests that other opinions of the court appear to indicate some equivocation on constitutional issues. Additionally, Justice Dickson appears to be willing to examine the statute under Article I, section 23.¹⁸ This analysis would appear to apply to all potential product liability plaintiffs, not just those suffering illnesses from exposure to substances similar to asbestos. Attorneys representing potential product liability plaintiffs, whose

11. *Id.* at 384 (citing IND. CODE § 22-3-7-9(f)(2) (1988)).

12. *Id.* at 387-90 (Shepard, C.J., and Dickson, J., dissenting).

13. *Id.*

14. *See* IND. CODE § 33-1-1.5-5.5 (Supp. 1990).

15. *Id.*

16. *Covalt*, 543 N.E.2d at 386 (emphasis added).

17. Article I, § 12 of the Indiana Constitution states:

All courts shall be open; and every person, for injury done to him in his person property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

18. Article I, § 23 of the Indiana Constitution states:

The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.

claims would otherwise be barred by the statute of repose, might consider acting on this advice from Justice Dickson.

The court of appeals discussed the discovery rule as it applies to the statute of limitations in *Allied Resin Corp. v. Waltz*.¹⁹ The issue in *Allied Resin* concerned when the "discovery" actually occurred for purposes of beginning the two-year statute of limitations of a product liability action. Waltz filed suit against two manufacturers for injuries he allegedly received from working with chemicals they manufactured. The evidence indicated that Waltz began feeling symptoms of nasal congestion and fatigue about one year after beginning work at the business that used the defendants' chemicals. His symptoms gradually worsened and he received various treatments over the next several years, including surgery and allergy injections. Although Waltz asked one doctor on June 20, 1984 whether exposure to the defendants' chemicals could have caused his symptoms, no conclusive diagnosis confirmed his suspicions until early 1986, approximately four years after he began working with the chemicals.

The court of appeals cited *Barnes v. A.H. Robins Co.*,²⁰ which stated that a cause of action accrues for purposes of the statute of limitations when the plaintiff discovers, or should have discovered, the injury and that it was caused by the product or act of another.²¹ The court then concluded that Waltz did not discover his cause of action until the diagnosis in early 1986 which connected his symptoms with the chemicals manufactured by the defendants.²²

An injured truck driver filing for benefits pursuant to the Worker's Compensation Act,²³ who attempted to apply the discovery rule to his case was not as fortunate. In *Ingram v. Land-Air Transportation Co.*,²⁴ a case involving a two-year statute of limitations, the court of appeals ruled that Samuel Ingram filed his claim for benefits too late when he submitted his claim more than two years following the accident in which he injured his shoulder. He was examined shortly after his accident, but doctors concluded he had no serious injury. After his pain worsened, he consulted another physician who discovered a disabling injury that would require corrective surgery. However, this diagnosis came almost three years after the accident. Ingram argued in favor of a discovery rule and that the time limitation for filing claims with the Worker's

19. 559 N.E.2d 390 (Ind. Ct. App. 1990). This case also involved § 33-1-1.5-5, quoted *supra* note 3. See also *Burks v. Rushmore*, 534 N.E.2d 1101 (Ind. 1989). *Burks* was discussed in the previous survey issue. See Talley, *Survey of Recent Developments in Tort Law*, 23 IND. L. REV. 585, 610-11 (1990).

20. 476 N.E.2d 84 (Ind. 1985).

21. *Allied Resin*, 559 N.E.2d at 393.

22. *Id.* at 394.

23. IND. CODE §§ 22-3-3-1 to -31 (1988).

24. 537 N.E.2d 532 (Ind. Ct. App. 1989).

Compensation Board should begin when the injury becomes manifest.

The court noted that in 1947, the Legislature changed the language of the time limitations provision in the Act so that the time which began to run from "the injury" now begins to run from "the occurrence of the accident."²⁵ This change in the statutory language, the court concluded, reflected legislative intent to require specifically that claims be filed within two years after the employee's accident.²⁶

Although *Covalt* is considered by some to be an aberration of judicial legislation,²⁷ it demonstrates, along with *Allied Resin* and *Ingram*, when a discovery rule may be applied to a limitations statute and when it may not. When the statute uses language such as "when the cause of action accrues," a discovery rule appears to be applicable. This language appears in section 33-1-1.5-5 and in the general limitations statute.²⁸ Language using "occurrence of the accident" indicates that the discovery rule should not apply. In addition to the Worker's Compensation Act, the notice provisions of the Indiana Tort Claims Act²⁹ is an "occurrence" statute.

The supreme court considered three cases concerning timeliness of filing the notice of claim pursuant to the Indiana Tort Claims Act.³⁰ The Act requires notice to be filed with the appropriate government entity within 180 days after a loss³¹ occurs for which the government is allegedly liable.³² This notice must be sent by registered or certified mail or in person.³³ The first two cases, *Wallis v. Marshall County Commissioners*³⁴ and *Boger v. Lake County Commissioners*,³⁵ may be read together. In *Wallis*, the plaintiffs were injured in an automobile accident allegedly caused by the county's negligent maintenance of a stop sign. They mailed their notices of claims by certified mail on the 180th day after the accident occurred and the county received them the following day. The trial court granted the government's motion for summary judgment based on the conclusion that notice was not timely, and the court of appeals agreed.³⁶ The supreme court vacated the opinion of the court of appeals and reversed the trial court.³⁷

25. *Id.* at 533 (citing IND. CODE § 22-3-3-3 (1988)).

26. *Id.*

27. *See supra* notes 2, 12.

28. IND. CODE § 34-1-2-2 (1988).

29. *Id.* §§ 34-4-16.5-6 and -7.

30. *Id.* §§ 34-1-16.5-1 to -22 (1988 and Supp. 1990).

31. *Id.* § 34-4-16.5-2(e) (Supp. 1990).

32. *Id.* §§ 34-4-16.5-6 and -7 (1988).

33. *Id.* § 34-4-16.5-11.

34. 546 N.E.2d 843 (Ind. 1989).

35. 547 N.E.2d 257 (Ind. 1989).

36. *Wallis v. Marshall County Comm'rs*, 531 N.E.2d 1223 (Ind. Ct. App. 1988).

37. *Wallis*, 546 N.E.2d 843.

The supreme court recited the requirement contained in section 34-4-16.5-7 of the Act, which requires "filing" within 180 days of the occurrence, and noted that the Act does not define "filing."³⁸ The court did acknowledge, however, that some notices mailed within the 180-day period might not be received by county officials until after the 180th day.³⁹ The court then compared the language of the present Act with the language of its predecessor, which required notice "to be received by some such municipal official within sixty (60) days after the occurrence"⁴⁰ The court concluded that the new wording indicated legislative intent that "filing" occurred upon mailing in cases in which notices were mailed.⁴¹

In *Boger*, the plaintiff sued the county for injuries received in an automobile accident allegedly caused by the county's failure to remove a fallen tree within the right-of-way. She did not file her notice until 183 days after her accident. However, the 180th day was a Saturday and the 182nd day, Monday, was a legal holiday because it was the day after Christmas. Therefore, the next day after the 179th day to mail the notice would have been on the 183rd day. The court referred to Indiana Trial Rules 6(A)(3) and (4), which state that the time period for filing shall exclude the last day if it falls on a holiday or a day when the appropriate office for filing is closed.⁴² Therefore, the court concluded, mailing on the 183rd day was timely in this case because the claimant was precluded by the holidays from mailing by the 180th day.

From *Wallis* and *Boger*, it appears that practitioners can safely conclude that "filing" of a tort claim notice against a government entity is done on the day the notice is mailed by certified or registered mail. If the last day of the 180-day period falls on a day when the receiving office is closed, such as a Saturday, Sunday, or legal holiday, then the claimant can mail the notice on the next day when the appropriate office is open, even if that day falls outside the 180-day period.

In *City of Lake Station v. Moore Real Estate*,⁴³ the supreme court analyzed the issue of when a loss occurs for purposes of beginning the 180-day period. Moore Real Estate applied for a building permit from the city's building commissioner, and the commission discussed the application at two of its meetings in March and April of 1985. At the second meeting, held on April 11, 1985, the commission decided to table

38. *Id.* at 844.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Boger*, 547 N.E.2d at 258.

43. 558 N.E.2d 824 (Ind. 1990).

the permit application in order to discuss it with the city attorney. After contacting the city attorney several times over the next several months and receiving no action on the permit application, Moore filed a notice of claim on October 12, 1985. Moore then filed suit on October 18, 1985.

Finding that Moore's loss occurred on April 11, 1985, the date the commission tabled its application for a building permit, the court of appeals held that Moore did not timely file its notice of claim and that the trial court erred in failing to grant the city's motion to dismiss.⁴⁴ The supreme court disagreed and vacated the court of appeals's opinion.⁴⁵ The supreme court agreed with Moore that the city committed a "continuing wrong" because the commission never decided to grant or deny the application.⁴⁶ The actual date of the loss was incapable of being precisely determined. It did not appear that the commission would deny the application until sometime in October of 1985, when Moore's attorney learned from the city attorney that he was going to tell the commission that the proposed building did not meet certain building requirements. The court also noted:

Accepting Lake Station's argument [that the loss occurred at the April 11th meeting] would permit government bodies to immunize themselves from tort claims simply by delaying a decision until the 180-day notice period expires. The notice provision is justified as a device providing a period for negotiation and possible settlement. It should not provide a method for evading responsibility through inaction.⁴⁷

Realizing that it would be unfair to penalize Moore for the city's inaction, the court held that its notice of claim was timely filed on October 12, 1985.⁴⁸

One issue remains unanswered by this case. If Moore had waited several more months before filing its notice of claim, assuming it acquired no knowledge of the possibility that its application might be denied, when would the loss be said to have occurred? Certainly, Moore had the responsibility of promoting action by the city at some point. The holding in this case should induce government entities to act quickly on requests such as this. If they do not, potential claimants should carefully maintain records of all communications with the government on such

44. *City of Lake Station v. Moore Real Estate*, 537 N.E.2d 61, 62 (Ind. Ct. App. 1989).

45. *Lake Station*, 558 N.E.2d at 825.

46. *Id.*

47. *Id.* at 827.

48. *Id.*

matters and file their claims before an undue length of time passes, as Moore did here.

The appellate court also addressed, in *Barton-Malow Co. v. Wilburn*,⁴⁹ an issue of first impression concerning the effect an appointment of a guardian for an incompetent ward would have on the tolling of the statute of limitations for an action the ward might have against a defendant. The general statute of limitations, which applies to this case, requires a personal injury action to be brought within two years after the cause of action accrues.⁵⁰ However, those under legal disabilities may file actions within two years after their disabilities are removed.⁵¹

On March 18, 1985, Bill Wilburn suffered a work injury that rendered him incompetent to manage his own affairs. His wife, Janet, became his legal guardian on June 25, 1985, and filed suit on his behalf against Barton-Malow Company on September 2, 1988. Barton-Malow moved for summary judgment on the basis that the suit was not filed within the applicable two-year statute of limitations.

As the court of appeals noted, all parties agreed that the normal limitations period is two years and that the statute of limitations has a savings clause for those suffering a legal disability. This clause allows filing of suit within two years after the disability is removed. However, Barton-Malow contended that the legal disability was removed for purposes of tolling the statute of limitations when Janet was appointed as Bill's guardian, and therefore suit should have been filed within two years of that date, or by June 25, 1987. The court of appeals agreed with the defendant and held the suit was barred because it was not timely filed.⁵² The court acknowledged that most jurisdictions hold that the appointment of the guardian does not remove the legal disability for purposes of their limitations statutes. However, the court noted Indiana's guardianship statute imposes an affirmative duty on the guardian to bring all necessary actions on the ward's behalf,⁵³ whereas the other state guardianship statutes are permissive.

The Indiana Supreme Court vacated this holding of the court of appeals.⁵⁴ The court held that the phrase "under legal disabilities," as used in the savings clause, includes those of unsound mind and that appointment of a guardian does not change this fact of mental un-

49. 547 N.E.2d 1123, 1124 (Ind. Ct. App. 1989), *aff'd in part and vacated in part*, 556 N.E.2d 324 (Ind. 1990).

50. IND. CODE § 34-1-2-2 (1988).

51. *Id.* § 34-1-2-5.

52. *Barton-Malow Co.*, 547 N.E.2d at 1125.

53. *Id.* (citing IND. CODE §§ 29-3-7-5, 29-3-8-1 (1988)).

54. *Barton-Malow Co., Inc. v. Wilburn*, 556 N.E.2d 324 (Ind. 1990).

soundness.⁵⁵ Therefore, the appointment does not terminate the legal disability.⁵⁶ The court concluded that the suit on Bill's behalf was timely filed.

The supreme court agreed with the court of appeals that Janet's claim for loss of consortium was barred by the two-year statute of limitations.⁵⁷ The rationale of the court is that the claim for loss of consortium is a separate and independent cause of action that need not be joined with the injured spouse's claim.⁵⁸ Therefore, Janet's loss of consortium claim accrued, and the limitations period began to run, on March 18, 1985.⁵⁹

The implications of the supreme court's holding for Indiana defendants is that they may remain potentially liable to some plaintiffs for many years after an accident occurs. To avoid the detrimental impact arising from such uncertainties, defendants should consider conducting early discovery while substantive facts remain fresh and settling cases involving incompetent potential plaintiffs. The goal is to resolve issues of liability in a more timely manner.

In another case of first impression in Indiana, the court of appeals addressed the effect of a conformity clause in a contract in which the parties agree to a limitations period for filing actions that is shorter than the statutory limitations period. In *Meridian Mutual Insurance Co. v. Cavaletto*,⁶⁰ the applicable statutory limitations period was ten years. By contract, the parties shortened the time limitation to one year. However, the contract also contained a conformity clause stating that all provisions in the contract that were in conflict with applicable state law were amended to conform with the state statutes. The question before the court was whether, for purposes of the conformity clause, the contractual limitations period was in conflict with the statutory limitations period.⁶¹ The court followed a line of cases from other jurisdictions that held that no conflict exists in such situations.⁶² Therefore, the conformity clause would not apply to change the limitations period unless the statute prohibits a contractual shortening of the limitations period.⁶³ Because Indiana's statute of limitations contains no

55. *Id.* at 325 (citing IND. CODE § 34-1-67-1(6) (1988)).

56. *Id.*

57. *Id.*

58. *Barton-Malow Co.*, 547 N.E.2d at 1125-26.

59. *Id.*

60. 553 N.E.2d 1269 (Ind. Ct. App. 1990).

61. *Id.* at 1270.

62. *Id.*

63. *Id.* at 1271.

such prohibition, the parties were bound by the one-year limitations period contained in the contract.⁶⁴

III. JURISDICTION

The Indiana appellate courts examined several cases in which one party challenged the trial court's *in personam* or subject matter jurisdiction. These challenges to the court's authority to act are generally brought as motions to dismiss under Indiana Trial Rule 12(B).⁶⁵ These motions do not convert to summary judgment motions when accompanied by affidavits or other supplemental information. Therefore, successful challenges to jurisdiction do not bar subsequent actions in courts with proper jurisdiction.⁶⁶

A. Personal Jurisdiction

Indiana courts acquire personal jurisdiction over nonresidents pursuant to Indiana Trial Rule 4.4. Under this rule, Indiana courts are said to apply a two-step analysis: (1) whether the defendant's acts giving rise to the suit are among those listed in Rule 4.4(A)(1) to (7), and (2) whether an Indiana court's assertion over the nonresident complies with due process requirements.⁶⁷ The recent decisions on personal jurisdiction reflect a further refinement of the minimum contacts test to determine compliance with due process.⁶⁸ In *In re Support of Seligman*,⁶⁹ the court of appeals held that the father of a child who resided in Indiana and whose legal guardianship was established in her aunt in a separate action did not have sufficient contacts with Indiana for an Indiana court to obtain personal jurisdiction over him for purposes of issuing a child support order. The father, who originally resided in Florida with his daughter, apparently consented to the child's aunt becoming her legal guardian. After the Indiana court ordered guardianship in the aunt, the father wrote a letter to the court objecting to its order. The court set

64. *Id.*

65. Ind. Trial Rule 12(B)(1) refers to lack of subject matter jurisdiction and 12(B)(2) refers to lack of personal jurisdiction. IND. R. TRIAL P. 12(B)(1), (B)(2).

66. See 1 W. HARVEY, INDIANA PRACTICE 587, 598, and Supp. 46 (West 1987 and Supp. 1990), and cases cited therein.

67. 1 W. HARVEY, INDIANA PRACTICE 121, 153 (West 1987).

68. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (For court's personal jurisdiction over nonresident defendant to comply with due process, defendant must "have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (citations omitted)), cited in *Tandy Computer Leasing v. Milam*, 555 N.E.2d 174, 177 n.3 (Ind. Ct. App. 1990). See also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

69. 542 N.E.2d 1030 (Ind. Ct. App. 1989).

a hearing on the matter, but the father never appeared. However, a few days later, the father sent a letter to the aunt authorizing her to tend to the child's medical needs and informing her of the child's medical insurance coverage. The father then cancelled that insurance without notice to the aunt, and the child later incurred significant medical costs. After paying the medical costs, the aunt filed an action for a support order requiring the father to reimburse her. The trial court denied the father's motion to dismiss for lack of personal jurisdiction over him and entered a support order.⁷⁰

The court of appeals reversed. The court noted that the jurisdictional requirements for the guardianship differed from those for the child support order. To establish guardianship over the child's estate, the guardianship court did not need personal jurisdiction over the father because the child's Indiana domicile and her ownership of property in Indiana were legitimate bases for the court to have jurisdiction to act on such a matter.⁷¹ The guardianship over the child's person must comply with the Uniform Child Custody Jurisdiction Act (UCCJA).⁷² The UCCJA gives a court of the state in which the child resides authority to award custody to an in-state resident even if the court would not be able to exercise personal jurisdiction over one parent.⁷³ Therefore, as the trial court's personal jurisdiction over the nonresident father had not yet been established by the guardianship order, the court still had to find that the father had sufficient minimum contacts with Indiana in order to exercise long-arm jurisdiction.⁷⁴ Because he had none, the court held the trial court lacked jurisdiction to order him to pay child support.⁷⁵ The father's communications with the guardianship court and the aunt did not constitute such sufficient minimum contacts because the father had never been in Indiana and had no other contacts with the state. This case provides further guidance to Indiana attorneys practicing in the area of domestic relations, and establishes once again the separability of different aspects of divorce, child custody, and support. Although the case did not involve a divorce, its holding concerning jurisdictional requirements in support orders is applicable in those situations.

A unanimous court of appeals held that a nonresident defendant who is not subject to the jurisdiction of an Indiana court may waive jurisdiction by requesting some affirmative relief from that court. In

70. *Id.* at 1031.

71. *Id.* at 1032.

72. *See* IND. CODE § 31-1-11.6-1 to -25 (1988 and Supp. 1990).

73. IND. CODE § 31-1-11.6-3 (1988). *See In re Marriage of Hudson*, 434 N.E.2d 107, 117 (Ind. Ct. App. 1982).

74. *See* IND. R. TRIAL P. 5.5(A).

75. *In re Seligman*, 542 N.E.2d at 1032.

Adams v. Budgetel Inns, Inc.,⁷⁶ Adams, an Indiana resident, sued Budgetel, which does no business in Indiana, in an Indiana court following an accident that occurred at a Budgetel Inn in Wisconsin. The court of appeals found that Budgetel waived the question of personal jurisdiction by voluntarily appearing in the action, requesting an extension of time to plead, and filing a motion for change of venue. Noting that the lack of *in personam* jurisdiction must be timely raised at trial or it is waived, the court held that Budgetel voluntarily submitted to the jurisdiction of the Indiana trial court by appearing and seeking affirmative relief.⁷⁷ The court of appeals also found that the trial court erred in attempting to divest itself of jurisdiction under Trial Rule 4.4(C)'s more convenient forum provision because the court had not obtained *in personam* jurisdiction under Trial Rule 4.4(A).⁷⁸ The court of appeals's narrow interpretation of Trial Rule 4.4(C) that Trial Rule 4.4(C) only applies when jurisdiction is established under Trial Rule 4.4(A) appears to be a new question of law in Indiana. In addition, the question of waiver of *in personam* jurisdiction by making a general appearance and requesting an extension of time and a change of venue appears to be in conflict with Trial Rule 12. Thus, the Indiana Supreme Court heard oral argument in this case on January 23, 1991.

Adams is distinguishable from *Alberts v. Mack Trucks, Inc.*,⁷⁹ in which the court of appeals held that serving interrogatories to the plaintiff does not waive personal jurisdiction by the defendant.⁸⁰ The reason for the distinction is that in *Adams*, the defendant sought some sort of affirmative relief from the trial court, and in *Alberts*, it did not. Because interrogatories do not need to be filed with the trial court, no action by the trial court had been requested. The defendant does not seek the court's assistance unless, for example, it files a motion to compel answers to interrogatories pursuant to Indiana Trial Rule 37.⁸¹

When analyzing *Seligman* in light of *Adams* and *Alberts*, one question arises that apparently was not raised by the aunt in *Seligman*. Did the child's father waive any challenge to the court's jurisdiction when, in the guardianship action, he sent a letter to the court objecting to the

76. 550 N.E.2d 346 (Ind. App. 1990).

77. *Id.* at 348.

78. *Id.*

79. 540 N.E.2d 1268 (Ind. Ct. App. 1989). For a discussion of *Alberts* with regard to its holding on who carries the burden of presenting evidence when personal jurisdiction is challenged, Funk, *Survey of Recent Developments in the Indiana Rules of Trial Procedure in Civil Matters*, 23 IND. L. REV. 241, 251-53 (1990).

80. *Alberts*, 540 N.E.2d at 1272.

81. *Id.* The defendant can still preserve its jurisdictional defense by filing a T.R. 12(B)(2) motion to dismiss before seeking other relief from the court. See IND. R. TRIAL P. 12(B)(2).

guardianship order? It is true that the guardianship was established in a prior action and that the father never appeared in court even after sending his letter of objection. However, the letter could be interpreted as a request for affirmative relief which, in fact, induced the guardianship court to set the matter for a hearing. The court of appeals' opinion does not reveal whether such an argument was made.

A defendant can also consent by contract to a state's long-arm jurisdiction over him before suit arises. *Tandy Computer Leasing v. Milam*⁸² involved an Indiana resident, Milam, who signed a computer leasing agreement with Tandy, a Texas corporation that has offices in Indiana. The agreement provided, in part, that Milam would submit to the Texas courts' jurisdiction. Tandy obtained judgment against Milam in a Texas court and was attempting to enforce it in Indiana. The court of appeals upheld this type of agreement so long as it is freely negotiated and not unreasonable or unjust.⁸³ The court remanded the case to the trial court to determine those issues. The court noted that absent the jurisdictional consent provision, Milam would not be subject to a Texas court's jurisdiction because his activities did not establish the certain minimum contacts required for a Texas court to assert jurisdiction over him. Therefore, this case turned on the validity of the contract provision at issue. Some of the factors used to determine the validity of forum selection clauses are the relative bargaining positions of the parties,⁸⁴ whether the clause is prominently set out or hidden in the contract,⁸⁵ and whether the evidence reveals that the parties actually negotiated the provision.⁸⁶

In *Ryan v. Chayes Virginia, Inc.*,⁸⁷ the court of appeals discussed the application of the "fiduciary shield doctrine" when a plaintiff sues both a corporate defendant and, in their individual capacities, its non-resident officers. This equitable doctrine apparently has never been applied in Indiana state appellate courts. However, the court found sufficient authority from federal courts located in Indiana and courts of other jurisdictions discussing this issue.⁸⁸ In this case, Ryan sued CV, Inc., Indiana, the corporation, and its officers, Astromsky, Perelman, and

82. 555 N.E.2d 174 (Ind. Ct. App. 1990).

83. *Id.* at 176 (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985)). See also *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

84. *The Bremen*, 407 U.S. at 12-13; *L.A. Pipeline v. Texas Eastern Products Pipeline*, 699 F. Supp. 185, 188 (S.D. Ind. 1988) (disparity in size of parties does not necessarily invalidate clause).

85. *L.A. Pipeline*, 699 F. Supp. at 188; *Tandy Computer Leasing v. Terina's Pizza, Inc.* 784 P.2d 7, 8 (Nev. 1989).

86. *Terina's Pizza*, 784 P.2d at 8.

87. 553 N.E.2d 1237 (Ind. Ct. App. 1990).

88. *Id.* at 1239-40.

Bergman, for wrongful termination of employment, breach of contract, detrimental reliance, and fraud in the inducement. The trial court found that Perelman and Bergman were Pennsylvania residents and acted only within the scope of their corporate duties in their dealings with Ryan.⁸⁹ Under these circumstances, the corporate officers are not subject to the long-arm jurisdiction of the state in which they do not reside. The court of appeals noted that an exception to the fiduciary shield doctrine exists "if the corporation is a 'sham,' in that it lacks sufficient assets to respond in damages to a suit or is the defendant's alter ego."⁹⁰ This sounds somewhat similar to cases in which courts pierce the corporate veil in order to subject corporate officers to personal liability in appropriate cases. For example, in *Hyatt International Corp. v. Inversiones Los Jabillos*,⁹¹ a federal district court refused to apply the "fiduciary shield" doctrine in a case in which a plaintiff alleged the defendant corporation was a mere instrumentality of the individual defendant to conduct the individual's personal business.⁹² However, the Second Circuit Court of Appeals has cautioned that the fraud element required in corporate veil-piercing cases need not be present to apply the exception to the fiduciary shield doctrine.⁹³

B. Subject Matter Jurisdiction

In an original action, *State ex rel. Hight v. Marion Superior Court*,⁹⁴ the Indiana Supreme Court examined a situation that represented the difference between subject matter jurisdiction to hear a general class of cases, the absence of which is not waivable, and subject matter jurisdiction to hear a particular case within that general class, the absence of which is waived if not timely raised. In 1984, after Nancy Hight filed a petition for dissolution of marriage from Mark Hight, the trial court entered a dissolution decree which noted that both parties agreed that Mark was not the biological father of Nancy's child, but Mark acknowledged the child to be his. The trial court then ordered Mark to provide child support for the child and ordered visitation rights for Mark and the child.⁹⁵ In 1989, Mark filed petitions with the Marion Superior Court

89. *Id.* at 1240.

90. *Id.* at 1240 n.4 (citations omitted).

91. 558 F. Supp. 932 (N.D. Ill. 1982).

92. *Id.* at 936. *See also* *Bulova Watch Co. v. K. Hattori and Co.*, 508 F. Supp. 1322, 1348 (E.D. N.Y. 1981) ("fiduciary shield" doctrine should not apply if corporation lacks sufficient assets to respond or is mere shell used to conduct individual's personal business).

93. *Marine Midland Bank v. Miller*, 664 F.2d 899, 903 (2d Cir. 1981).

94. 547 N.E.2d 267 (Ind. 1989).

95. *Id.* at 268.

regarding his visitation rights, alleging Nancy wrongfully denied visitation. In response, Nancy filed a motion to dismiss, alleging the trial court lacked subject matter jurisdiction over the case because the child was not a child of both parties to the marriage⁹⁶ and, therefore, the trial court's visitation order constituted a void order incapable of enforcement. After her motion to dismiss was denied, Nancy filed a petition for a writ of prohibition with the Indiana Supreme Court to prevent the Marion Superior Court from hearing Mark's petitions.

The supreme court held that the Marion Superior Court was entitled to hear this case because the dissolution court had subject matter jurisdiction over this type of case, and its authority to act was not nullified by the fact that the child was not of both parties to the marriage as required by Indiana Code section 31-1-11.5-2.⁹⁷ Specifically, the court stated:

Subject matter jurisdiction refers to the power to hear and determine a general class or kind of case. The absence of subject matter jurisdiction, an issue not subject to waiver, renders a judgment void and open to collateral attack. The parties by consent or agreement cannot confer subject matter jurisdiction on a court.

[I]f a tribunal possesses the power to determine cases of the general class to which the particular case belongs, it possesses subject matter jurisdiction to consider the particular case, absent specific and timely objections to the jurisdiction of such particular case. . . . A judgment of a court without jurisdiction of the particular case within the [general] class is not a void judgment. Such jurisdiction can be waived and must be attacked by proper and timely motion.⁹⁸

The court distinguished *State ex rel. McCarroll v. Marion Superior Court*,⁹⁹ cited by Nancy to support her theory, because in *McCarroll*, the trial court's authority was timely challenged.¹⁰⁰

96. See IND. CODE § 31-1-11.5-2(c) (1988).

97. *Hight*, 547 N.E.2d at 269.

98. *Id.* (alterations in original) (citations omitted). See also *Matter of Adoption of H.S.*, 483 N.E.2d 777 (Ind. Ct. App. 1985) (court's general subject matter jurisdiction over adoption proceeding was not vitiated by errors in petition or proceedings concerning statutory requirements to be met before ordering adoption). Compare *In re Marriage of Truax*, 522 N.E.2d 402 (Ind. Ct. App. 1988) (A trial court acting pursuant to Uniform Reciprocal Enforcement of Support Act (URESA) has no subject matter jurisdiction to order termination of child support due to interference with visitation. Authority of court is specifically limited by statute to enforcement of support order and its lack of subject matter jurisdiction over other aspects of divorce is not waivable.).

99. 515 N.E.2d 1124 (Ind. 1987).

100. *Hight*, 547 N.E.2d at 270. In *McCarroll*, the husband filed an *ex parte* petition

The Indiana appellate courts also heard several cases during the survey period that challenged a trial court's subject matter jurisdiction to act when the plaintiff's claim was arguably within the coverage of the Medical Malpractice Act.¹⁰¹ One case, *Methodist Hospital of Indiana, Inc. v. Rioux*,¹⁰² in particular is applicable to this Article because it describes the respective burdens of producing evidence when the defendant challenges the jurisdiction of the trial court to act before the case is submitted to a medical review panel pursuant to the Act's requirements.¹⁰³ The court of appeals determined the Act covers

any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury to another based on any act or treatment performed or furnished, or which should have been performed or furnished by the hospital for, to, or on behalf of a patient during the patient's medical care, treatment or confinement.¹⁰⁴

In *Winona Memorial Foundation v. Lomax*,¹⁰⁵ a 1984 case, the court of appeals held that a claim against a hospital for injury from a trip and fall sounded in ordinary negligence and premises liability and, therefore, did not fall within those cases intended to be governed by the Medical Malpractice Act.¹⁰⁶

In *Methodist Hospital of Indiana, Inc. v. Ray*,¹⁰⁷ the court of appeals relied on *Lomax* to affirm the trial court's denial of Methodist's motion to dismiss for lack of subject matter jurisdiction.¹⁰⁸ When Ray was a patient at Methodist, he became infected with the Legionnaire's Pneumonia Virus. Ray later filed a complaint against the hospital, alleging that it negligently allowed its premises to become infested with the virus, thereby causing his infection. The hospital's motion to dismiss was based

requesting custody of the child, not his, to be given to the maternal grandmother. The Indiana Supreme Court agreed with the wife, the child's mother, that the trial court lacked jurisdiction to grant the relief requested by the husband because he was not the child's father. Because the wife timely challenged the trial court's jurisdiction, the supreme court issued the writ of mandamus and prohibition against the trial court. *McCarroll*, 515 N.E.2d at 1125.

101. IND. CODE § 16-9.5-1-1 to -10-5 (1988 and Supp. 1990).

102. 438 N.E.2d 315 (Ind. Ct. App. 1982) (construing IND. CODE § 16-9.5-1-1(a)(1)(g), (h) and (i)).

103. *Id.* § 16-9.5-9-2 (1988).

104. *Id.* at 316.

105. 465 N.E.2d 731 (Ind. Ct. App. 1984).

106. *Id.* at 740-42 (distinguishing *Rioux*, 438 N.E.2d 315).

107. 551 N.E.2d 463 (Ind. Ct. App. 1990), *aff'd*, 558 N.E.2d 829 (Ind. 1990).

108. IND. R. TRIAL P. 12(B)(1).

on its contention that, pursuant to the Act, Ray should have first submitted his claim to a medical review panel. The trial court denied the motion and the court of appeals affirmed because Ray's complaint, as in *Lomax*, sounded in ordinary negligence for premises liability rather than poor medical care.

The *Ray* opinion is particularly instructive with regard to respective burdens when Trial Rule 12(B)(1) motions are brought, based on the belief that the case should have been submitted to a medical review panel. The court stated the issue as follows:

Our discussion turns upon who bears the burden on a 12(B)(1) motion and, more fundamentally, upon a determination of legislative intent with respect to the initial forum for complaints asserted by patients against health care providers. If the assumption is made that with the exception of some very limited circumstances all such cases were intended to be included within the Medical Malpractice Act (Act), then plaintiff must allege facts to take the claim outside the Act or suffer dismissal for failure to comply with the Act's jurisdictional prerequisite. On the other hand, if we begin with the assumption that only certain cases involving patients and providers were intended to come within the scope of the Act, then it is up to defendant-provider to demonstrate that a claim against the provider is within the Act and thus requires compliance with the Act's jurisdictional prerequisite.¹⁰⁹

From the court's discussion of precedent¹¹⁰ and the history of the Act, it appears that the court concluded that the first alternative reflects the legislative intent. Although Methodist, as the party challenging the court's subject matter jurisdiction, had the burden to establish the lack of it,¹¹¹ this burden does not arise if the face of the complaint reveals that the court lacked subject matter jurisdiction. Ray's complaint would have to allege facts sounding in ordinary negligence. Ray succeeded on this point by alleging Methodist "negligently and carelessly caused and permitted its premises to become infested and infected with the deadly *Legionella Pneumonia virus bacteria*"¹¹² This shifted the burden to Methodist to produce facts that would bring this case within the Act's scope.¹¹³

109. *Ray*, 551 N.E.2d at 465 (citation omitted).

110. *See id.* at 465-66.

111. *Id.* at 467 (citing *Alberts v. Mack Trucks, Inc.*, 540 N.E.2d 1268, 1270-71 (Ind. Ct. App. 1989)).

112. *Id.* at 464.

113. *Id.* at 467 ("Methodist would be relieved of this burden only if a lack of

Methodist failed to carry its burden; therefore, the trial court's denial of its motion to dismiss was proper.

In the last part of its opinion, the court further discussed the purposes of the Act and the rationale for excluding ordinary negligence claims from its scope. This discussion focuses particularly on the medical review panel, and notes that its members' expertise is limited to medical malpractice.¹¹⁴ This provides a rational basis for the line of decisions which refuse to hold that cases alleging ordinary negligence fall within the scope of the Act. However, it is still difficult to predict which future cases will fall under the Act and which cases will not. Although the *Ray* court found that prior cases represent a "consistent line of reasoning,"¹¹⁵ it appears that the result of a particular case could depend on how a complaint is framed. The distinction made between *Rioux*¹¹⁶ and *Lomax* was that in *Rioux*, the plaintiff alleged that the hospital "negligently and carelessly failed to properly provide appropriate care . . . to prevent [her] fall and injury,"¹¹⁷ and in *Lomax*, the plaintiff alleged negligent maintenance of the floor area where she fell.¹¹⁸ Had *Rioux* worded her complaint in terms alleging ordinary negligence, the result might have been different.¹¹⁹

Similarly, perhaps the *Ray* court would have concluded that *Ray*'s complaint alleged medical malpractice if he had alleged a failure to provide a sterile environment because such a failure might be deemed to relate to medical care. The *Ray* court cautioned that plaintiffs may not circumvent the Act merely by "alleging that the Hospital or doctor is the owner of the premises upon or in which the injury was sustained."¹²⁰ However, in close cases, the resolution of this issue may depend on artful drafting of the complaint.¹²¹

jurisdiction was apparent upon the face of the complaint. *Ray*'s complaint, sounding as it does in ordinary negligence, does not relieve Methodist of its burden. The only factual matter of record other than the complaint is the affidavit stating that a panel opinion had not been rendered. This is insufficient to divest the court of jurisdiction in this case."').

114. *Id.* at 468.

115. *Id.* at 466 (citing *Ogle v. St. John's Hickey Mem. Hosp.*, 473 N.E.2d 1055 (Ind. Ct. App. 1985)); *Lomax*, 465 N.E.2d 731; *Rioux*, 438 N.E.2d 315).

116. 438 N.E.2d 315.

117. *Id.* at 316.

118. 465 N.E.2d at 732.

119. Practitioners should note that in *Rioux*, the plaintiff did not respond to the defendant's motion for summary judgment with evidence showing her complaint fell outside the scope of the Act; whereas in *Lomax*, the plaintiff submitted an affidavit stating she was unattended by hospital employees at the time of her fall. See *Lomax*, 465 N.E.2d at 742.

120. 551 N.E.2d at 468 n.4.

121. See, e.g., *Harts v. Caylor-Nickel Hosp., Inc.*, 553 N.E.2d 874 (Ind. Ct. App. 1990).

IV. NOTICE

In several cases during the survey period, Indiana appellate courts considered the question of adequate notice under the Indiana Tort Claims Act¹²² and under the Trial Rules.¹²³ The Tort Claims Act, governing claims against the government, specifies facts concerning the claimant and his alleged loss that must appear in the notice of claim.¹²⁴

In *Collier v. Prater*,¹²⁵ the supreme court, in a case that presented an issue of first impression, examined the question of what constitutes adequate notice pursuant to the Tort Claims Act when the content of the notice is challenged. Collier sued the City of Indianapolis and two of its police officers for injuries allegedly received when the officers arrested him. Within 180 days after his arrest, Collier sent his notice of claim to the city legal department, the clerk, and the chief of police. The notice recited Collier's intent to seek damages for injuries received during his arrest and identified the officers involved. However, the notice did not specify the date of the arrest or the place it occurred. Collier also did not describe the circumstances surrounding his arrest that caused his injury. Despite these deficiencies, the supreme court, in a 3-2 decision, held that Collier substantially complied with the requirement of the Act.¹²⁶

The court noted that strict compliance with the content requirements is not necessary if the notice substantially complies with those requirements. The court then recited the standard for determining substantial compliance with the notice requirements of the Act:

In general, a notice that is filed within the 180-day period, informs the municipality of the claimant's intent to make a claim and contains sufficient information which reasonably affords the municipality an opportunity to promptly investigate the claim satisfies the purpose of the statute and will be held to substantially comply with it.¹²⁷

The city argued that the notice must at least contain the name of the party injured, the date and place of injury, and the nature of the claim.

122. IND. CODE §§ 34-4-16.5-1 to -22 (1988 and Supp. 1990).

123. IND. R. TRIAL P. 4 to 4.17.

124. IND. CODE § 34-4-16.5-9 (1988).

125. 544 N.E.2d 497 (Ind. 1989).

126. *Id.* at 499. Section 9 of the Act requires the notice to describe in a short and plain statement the facts on which the claim is based. The statement shall include the circumstances that brought about the loss, the extent of the loss, the time and place the loss occurred, the names of all persons involved if known, the amount of the damages sought, and the residence of the person making the claim at the time of the loss and at the time of filing the notice. IND. CODE § 34-4-16.5-9 (1988).

127. *Collier*, 544 N.E.2d at 499.

The court rejected this argument as requiring too formalistic an approach, favoring instead an inquiry that examines whether the city had sufficient information to determine its liability and prepare a defense.¹²⁸ The court held the omission of the place and date of the loss was not fatal here because the city easily could contact the two officers involved and have them determine when and where the incident occurred. The notice was held to contain sufficient information for the city to investigate Collier's claim and prepare an adequate defense.

The holding in *Collier* appears to be a departure from its previous ruling in *City of Indianapolis v. Satz*.¹²⁹ The court distinguished that case because Satz merely sent a letter to the mayor of Indianapolis, complaining about an incident involving a police officer. The letter did not state an intent to file a claim, nor did it contain a description of the incident. The court found that the notice given by Collier differed because it indicated an intent to seek damages and it stated that the injuries arose out of an arrest involving two officers whom Collier named. The court emphasized that the information given was sufficient for the city to conduct an investigation and prepare a defense. However, in *Satz*, the city also had sufficient information to conduct an investigation because it did just that,¹³⁰ but Satz's suit was dismissed because he failed to describe the incident in his letter.¹³¹

The conclusion to be drawn from an analysis of *Satz* and *Collier* is that if the plaintiff notifies the appropriate authorities of an intent to file a claim, and if the plaintiff fails to describe the incident in sufficient detail in his notice of claim but shows that the government had enough facts to induce it to investigate the claim, the plaintiff may be able to successfully ward off a motion to dismiss for failure to follow the notice requirements of the Act. Pursuant to *Collier*, it appears that the notice of *intent* to file a claim is more important than providing the date and place of the incident. Practitioners should be aware, however, that this may not be true of every type of loss suffered because of an act or omission of the government. For example, an injury suffered because of a poorly maintained sidewalk may be a situation in which more precise information, such as location, will be required. As the court stated, the issue of substantial compliance with the Act's notice provisions, although a question of law, is fact sensitive.¹³²

128. *Id.* at 500 (citation omitted).

129. 268 Ind. 581, 377 N.E.2d 623 (1978). *See also* Geyer v. City of Logansport, 267 Ind. 334, 370 N.E.2d 333 (1977).

130. 268 Ind. at 583, 377 N.E.2d at 625.

131. *Id.*

132. *Collier*, 544 N.E.2d at 500.

Also examined during the survey period was Indiana Trial Rule 4.15(F) which saves a party from dismissal of his suit for a defect in summons when that party's service "is reasonably calculated to inform the person to be served that an action has been instituted against him. . . ." ¹³³ In *Storm v. Mills*, ¹³⁴ the facts show that the plaintiff used all reasonable means to inform the defendant of her suit against him. She attempted to serve him at one address, but the summons was returned unserved showing the defendant was not found. Service at another address was achieved by the sheriff who left the summons and complaint with a woman who later turned out to be the defendant's daughter. The trial court entered a default judgment against the defendant after he failed to appear. In response to the defendant's subsequent motion to vacate the default judgment, the plaintiff stated in an affidavit that she had personal knowledge that the defendant conducted business at the address where service was made. The court of appeals held that the plaintiff's attempted service on the defendant was reasonably calculated to inform him of the pending action against him. ¹³⁵ Therefore, default judgment was proper. Practitioners should note that Rule 4.15(F) focuses on the conduct of the plaintiff to inform the defendant of an action against him, not on whether the defendant has knowledge that suit has been filed against him. ¹³⁶

Trial Rule 4.10, which must be read in some cases in conjunction with Rule 4.4, ¹³⁷ provides for the manner of service upon the Secretary of State. A court of appeals case, *Morrison v. Professional Billing Services, Inc.*, ¹³⁸ construes an attempt to rely on Trial Rule 4.10. In *Morrison*, the court of appeals held that the plaintiff did not use notice reasonably calculated to inform the defendant of the action pending against her. The defendant, Morrison, showed by affidavit that an employee of the billing company had been to her two residences in Illinois. Morrison also stated that she maintained a post office box in Michigan City next to the billing company's box and that officers of the company were aware of this. The billing company did not serve process at either of these addresses. Instead, it attempted service by

133. IND. R. TRIAL P. 4.15(F).

134. 556 N.E.2d 965 (Ind. Ct. App. 1990).

135. *Id.* at 967-68 (citing *Glennar Mercury-Lincoln, Inc. v. Riley*, 167 Ind. App. 144, 338 N.E.2d 670 (1975)).

136. *Storm*, 556 N.E.2d at 967-68 (citing *Glennar*, 167 Ind. App. at 151-53, 338 N.E.2d at 675).

137. Indiana Trial Rule 4.4(B)(2) provides that a nonresident defendant whose acts subject him to jurisdiction in Indiana under Rule 4.4 is deemed to have appointed the Secretary of State as his agent for service of process.

138. 559 N.E.2d 366 (Ind. Ct. App. 1990).

certified mail at an office address in Illinois which evidence later revealed Morrison had vacated. When that letter was returned unclaimed, the company served the Indiana Secretary of State, pursuant to Indiana Trial Rule 4.10, and published notice in a local newspaper. From these facts, the court of appeals held that the plaintiff failed to use the best method available to it to give Morrison notice of the pending action against her.¹³⁹ This is consistent with supreme court precedent requiring the best possible notice permitted under the circumstances. This requirement was aptly stated in *Mullane v. Central Hanover Bank & Trust Co.*,¹⁴⁰ in which the Court required notice to be more than "a mere gesture."¹⁴¹ Obviously, when considering this fact-sensitive issue, the Indiana appellate courts show an unwillingness to accept perfunctory attempts to serve process on a party to a pending action.

V. DISCOVERY

Pretrial discovery is governed generally by Indiana Trial Rule 26 which provides for the scope of discovery¹⁴² and for protective orders if an attempt at discovery impinges on information that, for some reason, should not be revealed.¹⁴³ The courts will not, however, grant mere "blanket" claims of privilege.¹⁴⁴ During the survey period, the appellate courts continued to define the scope of discovery pursuant to Indiana Trial Rule 26 in the face of challenges based on privileges, work product, and trade secrets.¹⁴⁵

In *Indiana Department of Transportation v. Overton*,¹⁴⁶ the court of appeals discussed a privilege claim based on the trial rule and federal statutory law. Following the death of his son in a car/train collision at a railroad crossing, Overton filed suit and then requested information from the Indiana Department of Transportation (INDOT) pertaining to certain railroad crossings in Indiana. INDOT resisted the request on the basis of 23 U.S.C. § 409 which prohibits admission at trial of information

139. *Id.* at 368.

140. 339 U.S. 306 (1950).

141. *Id.* at 315 ("The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.").

142. IND. R. TRIAL P. 26(B).

143. *Id.* at 26(C).

144. *Peterson v. U.S. Reduction Co.*, 547 N.E.2d 860 (Ind. Ct. App. 1989).

145. One case concerning the scope of discovery is *DeMoss Rexall Drugs v. Dobson*, 540 N.E.2d 655 (Ind. Ct. App. 1989), which rejected an insurer's claim that statements given to an insurer by an insured should not be discoverable. *DeMoss* was discussed in great detail in the last survey issue, see Funk, *Survey of Recent Developments in the Indiana Rules of Trial Procedure in Civil Matters*, 23 IND. L. REV. 241, 246-51 (1990), and was criticized for the harsh results it poses for insurance carriers.

146. 555 N.E.2d 510 (Ind. Ct. App. 1990).

compiled for the purpose of evaluating safety aspects of potential accident sites, hazardous roadway conditions, or railroad crossings. In addition to prohibiting its admission at trial, the statute states that such information may not be "considered for other purposes in any action for damages"¹⁴⁷ INDOT construed this language to mean discovery of such information is also prohibited. The court disagreed and held that such information was discoverable.¹⁴⁸ The court noted that the phrase "considered for other uses" implies use by a finder of fact and might include use for impeachment purposes.¹⁴⁹ The court concluded that pursuant to Trial Rule 26, as long as the sought-after information seemed reasonably calculated to lead to admissible evidence, it was discoverable.¹⁵⁰

The issue of discoverability of alleged trade secrets does not appear to have arisen in Indiana until the case of *Vibromatic Co. v. Expert Automation Systems Corp.*¹⁵¹ Vibromatic sued a corporation formed by some of its former employees for using trade secrets obtained while at Vibromatic to solicit sales from Vibromatic's customers. To test the validity of Vibromatic's claim that its trade secrets were used to compete for sales, the defendants sought to have outside experts examine the processes that Vibromatic alleged to be trade secrets. Because the proposed experts were also competitors, Vibromatic sought a protective order under Trial Rule 26(C). The court of appeals noted the dilemma of a trial court facing this situation:

An attempt to protect a trade secret would be futile if meritorious litigation would result in the disclosure of the trade secret. . . . The trial court, in exercising its discretion, faces an arduous task. While preserving the confidentiality of the trade secret, the trial court must strike a balance which ensures that a defendant is provided sufficient information to present a defense yet permits the trier of fact sufficient information to resolve the dispute on the merits.¹⁵²

The court then held that the trial court abused its discretion in denying the request for protective order without conducting a complete evidentiary hearing on the matter.¹⁵³ Further proceedings should reveal what Vibromatic specifically would have to prove to receive a protective order.

147. 23 U.S.C. § 409 (1987).

148. *Overton*, 555 N.E.2d at 512 (citing *Martinolich v. Southern Pacific Transp. Co.*, 532 So. 2d 435 (La. App. 1988)).

149. *Id.*

150. *Id.*

151. 540 N.E.2d 659 (Ind. Ct. App. 1989).

152. *Id.* at 661-62.

153. *Id.* at 662.

In *Pioneer Hi-Bred International, Inc. v. Holden's Foundation Seeds, Inc.*,¹⁵⁴ a case construing Federal Rule 26(c), the Federal District Court for the Northern District of Indiana noted that courts generally resist ordering disclosure of trade secrets unless a clear showing of immediate need is shown.¹⁵⁵ They generally require the party seeking production to show the trade secrets are relevant and that there is a specific need for them to prepare for trial.¹⁵⁶ The burden of proof is on the party seeking production.¹⁵⁷ However, this burden does not arise unless the party seeking the protective order shows: (1) that what it seeks to protect is a trade secret, and (2) its disclosure might be harmful.¹⁵⁸

VI. PLEADING AND PRACTICE UNDER INDIANA'S COMPARATIVE FAULT ACT

The Indiana Supreme Court construed Indiana's Comparative Fault Act in two companion cases decided during the survey period. These cases concern the procedure for pleading and proving the nonparty defense and what happens when certain defendants are dismissed before the end of trial. The legislature enacted the Comparative Fault Act¹⁵⁹ in 1983 to allow for allocation of fault among more than one defendant and other potentially liable parties and the plaintiff, if contributorily negligent. Damages are assessed according to a party's percentage of fault.¹⁶⁰ The nonparty defense,¹⁶¹ added by the legislature in 1984, enables a defendant to assert as a defense that the claimant's injuries may have been caused in whole or in part by an unnamed party. The burden of pleading and proving the nonparty defense is on the defendant.¹⁶²

In *Cornell Harbison Excavating, Inc. v. May*,¹⁶³ the supreme court discussed what happens if the defendant fails, or is unable, to specifically name the nonparty. The Mays sued Cornell Harbison after their automobile swerved into a ditch and hit the drainage and sewer pipe that was stored there. The Mays swerved into the ditch to avoid hitting a dog, and Cornell Harbison tried to name the "unknown owner of the

154. 105 F.R.D. 76 (N.D. Ind. 1985).

155. *Id.* at 81-82 (citing 4 MOORE'S FEDERAL PRACTICE 26.60(4), pts. 25-212).

156. *Id.* at 82 (citations omitted).

157. *Id.*

158. *Centurion Indus., Inc. v. Warren Steurer and Associates*, 665 F.2d 323, 325 (10th Cir. 1981).

159. IND. CODE §§ 34-4-33-1 to -13 (1988 and Supp. 1990).

160. *Id.* §§ 34-4-33-3 to -5 (1988).

161. *Id.* § 34-4-33-10.

162. *Id.*

163. 546 N.E.2d 1186 (Ind. 1989).

dog'' as a nonparty. The trial court granted the Mays' motion to strike the defense, and the appellate courts affirmed.¹⁶⁴ The supreme court rejected the defendant's contention that the statute requires only a general identification of the nonparty sufficient to distinguish it from other persons.¹⁶⁵ Instead, the court held that the plain meaning of the statute requires more than a mere generic description of the nonparty when it states that the verdict must disclose "the name of the nonparty."¹⁶⁶

This holding is consistent with the rest of the Act because, as the supreme court noted, the burden of pleading and proving the fault of the nonparty is on the defendant.¹⁶⁷ However, in cases such as the present one, in which it is practically impossible to determine the identity of a party who appears to be liable to the plaintiff, and that unnamed party's fault might be significantly greater than that of the named defendant, some inequities will result. However, the statute, as interpreted by the court, reflects a policy that, as between the plaintiff and the defendant who is partly at fault, the defendant should bear the burden of these inequities. The court also held that a Trial Rule 12(F) motion to strike is the proper mechanism to challenge the defendant's nonparty defense that fails to identify the nonparty.¹⁶⁸

In a more controversial case, *Bowles v. Tatom*,¹⁶⁹ the supreme court held that parties originally joined as defendants, but dismissed at the close of the plaintiff's case, cannot become nonparties for purposes of allocating a percentage of fault to them. Bowles and Tatom were involved in an automobile accident after Bowles failed to stop at a stop sign that she alleged was obscured by foliage. Under these circumstances, Bowles's insurer refused to pay Tatom's claim and Tatom then sued Bowles, the city of Bedford, and its mayor. The answers of the city and the mayor named the adjacent property owners as nonparties, and Tatom then added them as defendants. After viewing photographs of the scene and other evidence presented by Tatom in his case in chief, the trial court granted motions to dismiss the property owners, the city, and the mayor. Bowles did not object to the photographs Tatom used, which apparently showed the stop sign unobstructed, nor did she oppose the other defendants' motions to dismiss. Instead, she presented photographs showing the stop sign obscured by foliage. At the close of her

164. *Cornell Harbison Excavating, Inc. v. May*, 530 N.E.2d 771 (Ind. Ct. App. 1988), *aff'd*, 546 N.E.2d 1186 (Ind. 1989).

165. *Cornell Harbison*, 546 N.E.2d at 1187.

166. *Id.* (citing IND. CODE § 34-4-33-6 (1988)).

167. *Id.* (citing *Cornell Harbison*, 530 N.E.2d at 773).

168. *Id.*

169. 546 N.E.2d 1188 (Ind. 1989) vacating in part, *Bowles v. Tatom*, 523 N.E.2d 458 (Ind. Ct. App. 1988).

case in chief, the trial court found Bowles one hundred percent at fault, and allocated damages accordingly. The court of appeals held that the trial court should have considered the percentage of fault of the other defendants even though they were dismissed.¹⁷⁰

The supreme court vacated this portion of the court of appeals' decision, and affirmed the trial court's allocation of one hundred percent fault to Bowles. The court reviewed the applicable portions of the statute, particularly the definition of "nonparty" and the procedure for pleading and proving the nonparty defense which places the burden of proof on the defendant. The court noted that the city, the mayor, and the property owners could not be named as nonparties because the definition only includes those who have not been joined in the action as defendants.¹⁷¹ The court also stated that allocating fault to the city, the mayor, and the property owners as nonparties would contradict the statute's intent that the burden of proving fault of nonparties be on the defendant.¹⁷² These two conclusions posed a dilemma that the court said was resolved by considering the 1984 amendment which substituted the phrase "a party or nonparties" for "persons who are not parties to the action" in Indiana Code section 34-4-33-5(a)(1) and (b)(1).¹⁷³

One commentator suggested that the court's decision in *Bowles* was incorrect.¹⁷⁴ The commentator suggested that a defendant in Bowles's position has no statutory basis, although unable to name the other defendants as nonparties, to object to their dismissal because the plaintiff's evidence was insufficient to sustain his case against them. The result of the court's opinion was to shift the burden of producing evidence against these dismissed defendants to the remaining defendant, which is contrary to the statute because it placed such a burden on the plaintiff as against named defendants.

The commentator correctly noted that the court's holding appears to shift the burden of proof to the remaining defendant to prove the fault of other defendants he fears might otherwise be dismissed due to the plaintiff's lack of proof. On the other hand, although the court strictly construed the Act, its opinion seems to be correct. The nonparty is specifically defined as one who may be liable to the plaintiff but was not joined in the action as a defendant. This excludes those joined but later dismissed. Therefore, no fault can be allocated to these parties under Indiana Code section 34-4-33-5 because that section only allows allocation to the plaintiff, the defendant, and the nonparties.

170. *Bowles*, 523 N.E.2d at 461.

171. *Bowles*, 546 N.E.2d at 1190.

172. *Id.* (citing IND. R. TRIAL P. 8(C) and IND. SMALL CLAIMS R. 4(A)).

173. *Id.*

174. Harvey, *Rules, Rulings for the Trial Lawyer*, 13 RES GESTAE 530, 532 (1990).

If the stop sign was, indeed, obscured, Bowles may not have been negligent at all, in which case it was wrong to allocate any percentage of fault to her. Of course, fault cannot be allocated to Tatom if he was not at fault either. However, the statute requires the allocation percentages to total one hundred percent unless the factfinder concludes a nonparty is at fault. Because there were no nonparties here, the trial court was forced to allocate fault to either Tatom, Bowles, or both. This case exposes a defect in the statute that must be corrected so that a nonparty includes defendants joined but later dismissed. That way, the initial burden would remain on the plaintiff who should recover nothing if he cannot present sufficient facts to prove his case. Then, if the remaining defendant wanted to prove that the dismissed defendants were at fault, she could do so and have fault allocated to them as nonparties.

In the meantime, practitioners should follow the advice of the supreme court. In the present case, Bowles should have objected to Tatom's photographs on the basis that they did not accurately represent the accident scene as it existed the day of the accident. Further, Bowles should have opposed the motions to dismiss or asked the court to withhold its decision on the motion until the end of her case in chief.

VII. RELIEF FROM JUDGMENT

Under Trial Rule 60, a party may obtain relief from judgment in the case of clerical mistake, mistake by a party, excusable neglect, newly discovered evidence, or other reasons listed in the rule.¹⁷⁵ There is a one-year time limit for obtaining relief from judgment in cases in which parties request relief for reasons listed in Trial Rule 60(B)(1) through (4) and a limit of reasonable time in which parties request relief for reasons listed in paragraphs (5) through (8). Relief pursuant to a Rule 60(B)(8) motion will be granted only if the movant presents the court with extraordinary circumstances.¹⁷⁶

The Indiana appellate courts were faced with the question of what is a "reasonable time"¹⁷⁷ after judgment for filing a Trial Rule 60(B) motion for relief from judgment in *Fairrow v. Fairrow*.¹⁷⁸ On February 7, 1975, Joe and Mary Fairrow obtained a divorce decree that determined

175. IND. R. TRIAL P. 50(A), (B).

176. *Shotwell v. Cliff Hagan's Ribeye Franchise, Inc.*, 553 N.E.2d 204, 207 (Ind. Ct. App. 1990), *transfer pending*.

177. See IND. R. TRIAL P. 60(B) ("The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4).").

178. 543 N.E.2d 649 (Ind. Ct. App. 1989), *vacated*, 559 N.E.2d 597 (Ind. 1990).

that Joseph D. Fairrow, born June 7, 1974, was a child of the marriage. Paternity of Joseph was not disputed at this time and the decree ordered Joe to pay child support. By the time Joseph was about twelve years old, Joe discovered that it was impossible that he could be Joseph's father because Joseph had the trait for sickle cell anemia and neither Joe nor Mary carried this trait. Because she was tested sometime between 1974 and 1976, Mary knew she did not have the sickle cell trait. However, Joe was not tested until 1986, when Joseph experienced symptoms of sickle cell anemia. Shortly after this discovery, but eleven years after the date of the decree, Joe filed a Trial Rule 60(B)(8) motion to terminate support. The trial court denied relief. After two additional motions and still no relief, Joe appealed the trial court's decision.

Although Joe did not file a motion to correct errors after the trial court's first alleged error, the court of appeals did not rely on waiver of the right to appeal to deny Joe relief.¹⁷⁹ Instead, the court denied relief on the basis that eleven years after judgment was not a "reasonable time," as required by the Rule, in which to later challenge that judgment.¹⁸⁰ The court held that in order for the eleven years to be considered a reasonable time, Joe would have to present facts or circumstances other than that he is not Joseph's biological father.¹⁸¹ The reason for requiring a showing of additional circumstances, the court found, is that by "conduct or circumstances, one who is not a biological father of a child may have become obligated to a continuing duty of support for that child."¹⁸² The conduct or circumstances applicable in this case were that Joe paid support for eleven years as if Joseph had been his natural son. Judge Buchanan, dissenting, noted that a substantial change in circumstances did occur, that change being Joe's later awareness, through medical tests, that he was not Joseph's biological father.¹⁸³

On transfer, the Indiana Supreme Court vacated the court of appeals's opinion.¹⁸⁴ Also holding that Joe did not waive his right to an appeal,¹⁸⁵ the court proceeded to the merits of the 60(B) motion. The court held that eleven years was a reasonable time after which to file

179. *Id.* at 651 n.2 (holding that the pre-appeal order had determined substantive issue to be preserved).

180. *Id.* at 653.

181. *Id.* at 652.

182. *Id.* at 653 (citing *R.D.S. v. S.L.S.*, 402 N.E.2d 30 (Ind. Ct. App. 1980)).

183. *Id.* at 653-54 (Buchanan, J., dissenting) (citing IND. CODE § 31-1-11.5-17(a) (1988), which allows a child support order to be modified upon a showing of changed circumstances).

184. *Fairrow*, 559 N.E.2d 597 (Ind. 1990).

185. *Id.* at 598.

a Trial Rule 60(B)(8) motion, noting that Joe had no reason to question the divorce court's paternity determination until his doctor suggested, eleven years later, that he undergo testing for the sickle cell trait.¹⁸⁶ Although granting Joe relief, the court warned against the potential abuse of the courts in future divorce proceedings:

Although we grant Joe relief, we stress that the gene testing results which gave rise to the *prima facie* case for relief in this situation became available independently of court action. In granting relief to a party who learned of his non-parenthood through the course of ordinary medical care, we do not intend to create a new tactical nuclear weapon for divorce combatants. One who comes in to court to challenge a support order on the basis on non-paternity without externally obtained clear medical proof should be rejected as outside the equitable discretion of the trial court.

In sum, we strongly discourage relitigation of support issues through T.R. 60(B)(8) motions in the absence of highly unusual evidence akin to the evidence presented in this case.¹⁸⁷

The question inevitably arising from the circumstances of this case is whether putative fathers, during initial divorce proceedings, will raise an excess of unmerited claims that they did not father the children of their marriages. Certainly, if left alone, the court of appeals decision would have the potential to cause an increase in such claims. Faced with uncontroverted evidence that Joe was not Joseph's biological father, the court nevertheless held against him because of the lapse of time between the original decree and the filing of his first motion to terminate support. This would have had the effect of inducing husbands to question paternity at the original divorce proceedings to assure that they would not be precluded from raising such an issue later. The result also could have led a few unscrupulous husbands and their attorneys to raise unmerited issues concerning paternity at the outset of such proceedings, under the guise of valid disputes, in order to harass their opponents/spouses. The supreme court has at least provided those with valid paternity disputes an opportunity to come forward with newly discovered medical evidence that establishes nonpaternity years after the decree is entered. However, the warning quoted above reveals the court's intention to have its holding applied to a limited number of cases. Certainly, attorneys whose clients have valid concerns of whether the children of marriages are the fathers' biological children would be wise to have such

186. *Id.* at 599.

187. *Id.* at 600.

concerns resolved early in the proceedings to assure themselves of preserving this issue.

VIII. CONCLUSION

Although every written opinion involves an issue concerning procedural law, this Article highlights the more significant issues discussed during the survey issue. These issues appear in construction of the trial rules as well as procedural sections of various Indiana statutes. Practitioners should keep in mind that the rules and statutes are constantly undergoing revisions that supercede case law. However, they may also provide new opportunities for trial lawyers.

1990 Federal Practice and Procedure Update for the
Seventh-Circuit Practitioner

JOHN R. MALEY*

INTRODUCTION

Indiana practitioners litigating in federal court encountered significant developments in federal civil practice last year. The courts rendered a number of important decisions affecting nearly all aspects of federal litigation. This Article, as the third of an annual section on federal civil practice, highlights the more important issues in an effort to assist local attorneys in their federal civil litigation.¹

This Article covers diverse topics including subject-matter jurisdiction, service of process, discovery, and post-judgment motions. The developments that this author deems of greatest importance and interest are discussed at length. Other issues are raised merely so that practitioners are aware of them.

The subjects are presented in the order in which they often arise in litigation. For ease of future reference, the following table of contents outlines the subjects discussed:

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1. This is the third year that the Survey Issue has covered developments in federal civil practice. See Maley, *1989 Developments in Federal Civil Practice Affecting Indiana Practitioners: Issues of Diversity Reform; Pendent Party Jurisdiction; Summary Judgment; Impeachment by Prior Conviction; Sanctions; and Appeal*, 23 IND. L. REV. 261 (1990) [hereinafter Maley, *1989 Developments*]; Maley, *Developments in Federal Civil Practice Affecting Indiana Practitioners: Survey of Supreme Court, Seventh Circuit, and Indiana District Court Opinions*, 22 IND. L. REV. 103 (1989) [hereinafter Maley, *1988 Developments*]. These articles concentrate on key decisions of the Seventh Circuit Court of Appeals, and also highlight major developments at the national level as well as particularly instructive decisions of the local district courts. The focus is on federal civil practice and procedure. Substantive federal decisions and matters of criminal procedure are left to other forums.

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I. DEVELOPMENTS IN SUBJECT-MATTER JURISDICTION

A. Diversity Jurisdiction

Several important decisions during the survey period dealt with diversity jurisdiction. For instance, in *Carden v. Arkoma Associates*,² the United States Supreme Court held that for purposes of diversity, the citizenship of a limited partnership is determined by the citizenship of not just the general partners, but also of the limited partners. The case arose when a limited partnership organized under the laws of Arizona sued two Louisiana citizens in federal court in Louisiana. The defendants moved to dismiss, asserting that complete diversity was lacking because one of the plaintiff's limited partners was a Louisiana citizen.

The district court denied the motion to dismiss, and later entered judgment in favor of the limited partnership on the merits. The Fifth Circuit affirmed, reasoning that for diversity purposes a limited partnership's citizenship should be determined by the citizenship of the general partners only.³

The Supreme Court reversed in a hotly contested 5-4 decision. Writing for the majority, Justice Scalia first explained that the citizenship of the limited partnership in its own right is not to be considered in determining diversity. He noted that "[w]hile the rule regarding the treatment of corporations as 'citizens' has become firmly established, we have . . . just as firmly resisted extending that treatment to other entities."⁴ Indeed, Congress stepped into the foray in 1958 by providing guidelines in 28 U.S.C. § 1332(c) as to how a corporation should be

2. 110 S. Ct. 1015 (1990).

3. *Arkoma Assoc. v. Carden*, 874 F.2d 226 (5th Cir. 1988).

4. *Carden*, 110 S. Ct. at 1018.

treated for diversity purposes. However, “[n]o provision was made for the treatment of artificial entities other than corporations, although the existence of many new . . . forms of commercial enterprises . . . must have been obvious.”⁵

The majority thus deferred to Congress to determine which of the “wide assortment of artificial entities possessing different powers and characteristics, and composed of various classes of members with varying degrees of interest and control”⁶ is “entitled to be considered a ‘citizen’ for diversity purposes”⁷ The majority also held that the citizenship of all partners, limited and general, must be considered for diversity. The Court explained that “the approach of looking to the citizenship of only some of the members of the artificial entity finds even less support in our precedent than looking to the State of organization”⁸ The Court thus “adhere[d] to [the] oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of ‘all the members,’ or ‘the several persons composing such association’”⁹

Justice O’Connor, joined by Justices Brennan, Marshall, and Blackmun, dissented in a sharply worded opinion. To Justice O’Connor, the majority did not really leave the issue to Congress, “but rather decide[d] the issue and then invoke[d] deference to Congress to justify its newly formulated rule that the Court will, without analysis of the particular entity before it, count every member of an unincorporated association for purposes of diversity jurisdiction.”¹⁰ She added that applying statutes to “situations not anticipated by the legislature is a pre-eminently judicial function.”¹¹ To Justice O’Connor, the appropriate standard would have been to look to who is really a party to the controversy, and, as suggested by the commentators, hold that the citizenship of limited partners should not be counted.¹²

The debate is academic for the foreseeable future, however, particularly because the majority included the usual conservatives, with now-retired Justice Brennan joining in the dissent. After *Carden*, all associations that are not “corporations” as the term is used in section 1332(c) will be deemed citizens of every state in which a member resides. It is

5. *Id.* at 1022.

6. *Id.*

7. *Id.*

8. *Id.* at 1019.

9. *Id.* at 1021 (citations omitted) (quoting *Chapman v. Barney*, 129 U.S. 677, 682 (1889), and *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456 (1900)).

10. *Carden*, 110 S. Ct. at 1023 (O’Connor, J., dissenting).

11. *Id.*

12. *Id.* (citing various law review articles).

possible, as the dissent suggests, that the decision is a result of the concern over expanding diversity jurisdiction at a time when "our federal courts are already seriously overburdened."¹³ However, as the dissent points out, the "concern is more illusory than real in the context of unincorporated business associations"¹⁴ because "unincorporated associations may gain access to the federal courts by bringing or defending suit as a Rule 23 class action, in which case the citizenship of the members of the class would not be considered."¹⁵

The Seventh Circuit addressed a similar issue in *Northern Trust Co. v. Bunge Corp.*,¹⁶ where the court essentially held that a corporation is not always a "corporation" under the diversity statutes. The basic facts of the case are necessary to understand the jurisdictional issue. The Bunge Corporation had entered into a stock purchase agreement to buy the stock of another corporation. Under the purchase agreement, Northern Trust was the agent for each of the seller's stockholders. The agreement contained a provision warranting that the seller had certain intellectual-property rights, and that the purchase price of the shares would be adjusted for any liabilities or claims arising out of the breach of such warranties.

Subsequently, a separate dispute arose over whether the seller had infringed a patent of an unrelated entity. The Bunge Corporation advised Northern Trust of the matter, and indicated that the dispute might give rise to a price adjustment under the purchase agreement. Bunge thereafter demanded compensation pursuant to the price-adjustment provision. Northern Trust, acting in its capacity as agent for the sellers, then filed a diversity action in federal court seeking a declaratory judgment that the price-adjustment provisions were inapplicable. The complaint recited that Northern Trust was a citizen of Illinois and Bunge Corporation a citizen of New York. The Bunge Corporation filed a counterclaim against Northern Trust.¹⁷

After eighteen months of litigation, the district court entered judgment against Northern Trust. The court held that Northern Trust was liable in its individual capacity, but noted that the judgment eventually would be satisfied by the individual sellers who would indemnify Northern Trust.¹⁸

13. *Id.* at 1027.

14. *Id.* (citing *Federal Diversity Jurisdiction - Citizenship for Unincorporated Associations*, 19 VAND. L. REV. 984, 991-92 (1966)).

15. *Id.*

16. 899 F.2d 591 (7th Cir. 1990).

17. *Id.* at 593.

18. *Id.*

On appeal, the parties continued to assume that diversity was present. At oral argument, however, the Seventh-Circuit panel inquired whether one or more of the sellers that was represented by Northern Trust might share New York citizenship with the defendant such that complete diversity would be destroyed. Subsequent briefing on the issue was ordered, and both parties asserted that jurisdiction was proper. The Seventh Circuit, though, disagreed and dismissed the action without prejudice.¹⁹

The Seventh Circuit began by noting the maxims that federal courts are courts of limited jurisdiction, and that complete diversity must be present among the plaintiffs and defendants. The court then wrote that whether complete diversity is present is usually straightforward, but when “a lawsuit involves groups of individuals or parties representing groups of individuals . . . the determination is more complicated.”²⁰ The court then gave an excellent review of the rules that govern such situations, which is summarized as follows:

- federal courts must look to the individuals being represented rather than their collective representative to determine diversity;²¹
- two statutory provisions codify this rule for specific situations:
 - 28 U.S.C. § 1332(c)(1) establishes that in direct actions against insurers in which insureds are not joined, the insurer is deemed a citizen of the same state as the insured;²² and
 - 28 U.S.C. § 1332(c)(2) mandates that legal representatives of estates of decedents, infants, or incompetents are deemed to be citizens of the person represented;²³
- partnerships and limited partnerships are not considered citizens of any state, with the citizenship of the partners being determinative;²⁴
- certain exceptions exist to the rule that associations do not have citizenship of their own, such as:
 - corporations are citizens of their state of incorporation and principal place of business under 28 U.S.C. § 1332(c)(1);²⁵

19. *Id.* at 598.

20. *Id.* at 594.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

- shareholders who bring derivative suits can establish diversity based on their own citizenship even though they are suing on behalf of the corporation under *Doctor v. Harrington*;²⁶
- members of a class in a class action are deemed to have the same citizenship as the class representative under *Snyder v. Harris*;²⁷ and
- trustees of express trusts who have legal title to trust property and who sue in their own names can establish diversity based on their own citizenship rather than that of the trust's beneficiaries under *Navarro Savings Association v. Lee*²⁸ and *Goldstick v. ICM Reality*.²⁹

The Seventh Circuit then held that Northern Trust did not fall into any of these recognized exceptions to the rule that a representative is to be considered a citizen of the states of the principals it represents. Although Northern Trust is a corporation, the court held that "Northern [Trust] in its capacity as a representative is a distinct entity."³⁰ The court wrote:

The statutory provision that entitles a corporation to participate in a suit in federal court based on the corporation's own citizenship is grounded in the notion that the corporation's shareholders are deemed to be citizens of the state in which the corporation is incorporated. *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314, 328 (1854). Thus the statute is designed to cover those suits in which the interest of the corporation's own shareholders may be affected because of some impact on the corporation's net assets. In initiating this lawsuit Northern did not seek to protect any interest of its own shareholders. Rather, Northern sought to fulfill its fiduciary duties as an agent for the sellers of the stock. . . . In the eyes of the law a person who sues or is sued in a representative capacity is distinct from that person in his individual capacity. *Alexander v. Todman*, 361 F.2d 744, 746 (3d Cir. 1966). This is no less true where the "person" suing is a corporation. Accordingly, the fact that

26. *Id.*; see *Doctor v. Harrington*, 196 U.S. 579 (1905).

27. *Northern Trust*, 899 F.2d at 594; see *Snyder v. Harris*, 394 U.S. 332 (1969).

28. *Northern Trust*, 899 F.2d at 594; see *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980).

29. *Northern Trust*, 899 F.2d at 594; see *Goldstick v. ICM*, 788 F.2d 456 (7th Cir. 1986).

30. *Northern Trust*, 899 F.2d at 594.

the Northern Trust Company, an Illinois corporation, is deemed a citizen of Illinois for diversity purposes is suits affecting the interests of its own shareholders does not mean that it will be deemed a citizen of Illinois in its capacity as an agent representing the interests of others.³¹

The Seventh Circuit added that Northern Trust had not sued in its own name and it did not have legal title to any property that was the subject of the suit.³² The court then held that jurisdiction was lacking because, although none of the seventy-seven sellers of stock was from the same state as the defendant, only three of those sellers could independently satisfy the amount-in-controversy threshold. The court concluded:

Northern in its capacity as representative must establish that it satisfies the conditions of the diversity statute. For purposes of that statute Northern is deemed to have the same citizenship and amount in controversy as each of the individuals it purports to represent. Since some of those individuals do not satisfy both requirements of the diversity statute, the district court did not have jurisdiction over this action.³³

Both *Carden* and *Northern Trust* thus illustrate that extreme care must be taken to ensure that diversity jurisdiction is present in such situations.³⁴ As the Seventh Circuit has noted on other occasions, the courts are to be vigilant in policing the limits of their jurisdiction.³⁵ Indeed, the district courts of this circuit have been reminded of the "importance of scrupulous adherence to the jurisdictional limitations of the federal courts."³⁶ As expressed in *Griffith v. Sealtite Corp.*, "An

31. *Id.* at 594-95.

32. *Id.*

33. *Id.* at 597. Another panel of the Seventh Circuit addressed this same issue several months later in *Griffith v. Sealtite Corp.*, 903 F.2d 495 (7th Cir. 1990), writing that "[m]ultiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount; they cannot aggregate 'claims where none of the claimants satisfies the jurisdictional amount.'" *Id.* at 498 (quoting *Zahn v. International Paper Co.*, 414 U.S. 291, 294-95 (1969)).

34. See also *National Ass'n of Realtors v. National Real Estate Ass'n*, 894 F.2d 937 (7th Cir. 1990) (action brought by an incorporated association on behalf of its members, which was neither a derivative suit nor a class action and that did not involve injury to the association's own property, could not be based on diversity when citizenship of any member was the same as the defendant); *Griffith*, 903 F.2d at 495 (court allows appellant to raise jurisdiction for first time on appeal, and finds amount-in-controversy minimums lacking).

35. *Matchett v. Wold*, 818 F.2d 574, 575 (7th Cir. 1987).

36. *Newman-Green, Inc. v. Alfonzo-Larrain*, 854 F.2d 916, 923 (7th Cir. 1988) (en banc).

early resolution of [jurisdictional issues] w[ill] . . . save[] much judicial time and expense to the parties.”³⁷

Practitioners are thus well advised, particularly in multi-party or representative/association-type actions, to take the time to pin down the precise factual and legal foundation of jurisdiction before filing in federal court. If the opponent and the district court do not raise any jurisdictional defects, the Seventh Circuit surely will, particularly in light of the specificity required in the jurisdictional statements required to be filed on appeal.³⁸

B. Amendment of Defective Pleadings to Show Jurisdiction

Fortunately, not all cases with jurisdictional issues result in dismissals. For instance, in *International Brotherhood of Boilermakers v. Local Lodge D354*,³⁹ the Seventh Circuit allowed defective allegations of a complaint to be amended on appeal even though jurisdiction would have been lacking as the complaint was originally framed. The plaintiff named Local D354 as the defendant in its action, but this entity no longer existed at that time due to a decertification election.

As is its wont, the Seventh Circuit raised the issue on its own during oral argument. In its subsequent decision, it noted that although “it is

37. *Griffith*, 903 F.2d at 499.

38. See 7TH CIR. R. 3(c) and 28(b), which require detailed jurisdictional statements to be filed with the notice of appeal and the appellate briefs.

The *Northern Trust* decision also shows that the courts will look beyond the language of a statute to find jurisdiction lacking. The language of 28 U.S.C. § 1332(a) states that the district courts shall have jurisdiction of “all civil actions” when diversity is present and the amount-in-controversy requirement is met. 28 U.S.C. §§ 1332(a) (1990). Section 1332(c)(1) then states that for the purpose of § 1332 and 1441, “a corporation shall be deemed to be a citizen of any State by which it has been incorporated and for the State where it has its principal place of business, except that in any direct action against the insurer [special rules apply]” *Id.*

A strong argument could be made that Northern Trust’s action was properly in the federal courts, for surely it was among the group of “all civil actions” over which § 1332(a) says the district courts “shall” have jurisdiction. Moreover, Northern Trust certainly is a “corporation” for purposes of § 1332(c). Because § 1332(c)(1) only has one exception (for direct-action insurance cases), it would seem that no other exception (such as for actions by corporations that do not benefit or protect the shareholders) was contemplated by Congress. The Seventh Circuit often writes that statutes and rules are to be interpreted according to their plain meaning. Indeed, Judges Cummings, Easterbrook, and Eschbach, who decided *Northern Trust*, all joined in a recent *en banc* dissent authored by Judge Manion that was premised upon the “plain language” rule. See *Varhol v. National Railroad Passenger Corp.*, 909 F.2d 1557 (7th Cir. 1990) (Manion, J., dissenting). One could legitimately argue that the plain language of § 1332 mandates federal courts to exercise jurisdiction over an “action” such as the one maintained by *Northern Trust*.

39. 897 F.2d 1400 (7th Cir. 1990).

critical for obvious reasons that proper parties be named in lawsuits, the doubt in this case can be satisfactorily resolved.”⁴⁰ The court explained that the plaintiff should have named the successor Local as defendant, but nonetheless allowed amendment to cure the defect under 28 U.S.C. § 1653, which states, “Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.”⁴¹

The court added:

Though subject-matter jurisdiction of course cannot be waived, it is noteworthy that the Local and its officers never questioned the district court’s jurisdiction to determine this controversy until the panel raised the question at oral argument in this appeal. When, as here, the merits have already been decided and factual questions do not need to be resolved regarding prejudice to the correctly named defendant, it would be a meaningless gesture to remand so that plaintiff could amend its pleading under Rule 15 Instead the sensible course is for this Court to permit amendment under 28 U.S.C. § 1653. Therefore, we shall consider the complaint as amended to cover the present . . . Local [This is allowable], for the amendment here represents the facts as they existed at the commencement of the suit⁴²

The *Local D354* decision thus shows that defective jurisdictional allegations can be cured, even on appeal. The protection of section 1653, however, extends only to “*allegations of jurisdiction*,” and thus does not apply to situations in which jurisdiction does not actually exist.⁴³

C. Jurisdiction to Interpret Settlement Agreements

When litigation is settled, the parties usually enter into a written settlement agreement specifying the terms of the settlement, and such agreements are often sent to the district judge for signature. When disputes later arise as to what the agreement means, there is often a question of whether the district judge has the power to interpret the agreement.

This issue was addressed by the Seventh Circuit in *United Steelworkers v. Libby, McNeill & Libby*.⁴⁴ The parties had signed a settlement

40. *Id.* at 1402.

41. 28 U.S.C. § 1653 (1990).

42. *International Brotherhood of Boilermakers*, 897 F.2d at 1402-03 (citations omitted).

43. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 831 (1989) (emphasis in original).

44. 895 F.2d 421 (7th Cir. 1990).

agreement and submitted it to the judge, who also signed it. The action was subsequently dismissed by the court pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. Two years later, one of the parties moved the district judge to clarify the settlement agreement, but the motion was denied.

The Seventh Circuit affirmed, reasoning that the district court had no jurisdiction to interpret the agreement. According to the Seventh Circuit, "If the parties want the district judge to retain jurisdiction they had better persuade him to do so."⁴⁵ However, "[a]ll that is necessary is that it be possible to infer that he did intend to retain jurisdiction - that he did not dismiss the case outright, thereby relinquishing jurisdiction."⁴⁶ Because the settlement agreement was not an agreed judgment, and because nothing in the agreement "indicate[d] that the parties intended for the district judge to exercise supervision over the completion of the agreement,"⁴⁷ the Seventh Circuit held that jurisdiction was lacking.

The court added:

While asking a judge to approve and sign a negotiated settlement agreement may be a fairly common and acceptable practice (perhaps based more on tradition and courtesy than the Federal Rules of Civil Procedure), it does not constitute a grant of retained jurisdiction.

We certainly do not mean to give the impression that a district court cannot interpret the language of its own orders or judgments. To the contrary, it is without question that it can. Thus, to the extent that a settlement agreement is incorporated into a court's final judgment or order, the district court retains jurisdiction to interpret that agreement and order its enforcement.⁴⁸

Thus, when negotiating settlement agreements, practitioners should consider whether the district judge's supervision is needed for a certain period of time. Assuming that the judge is willing to retain such jurisdiction, the agreement must expressly indicate this. Otherwise, the court lacks jurisdiction, and the agreement can only be interpreted by a new declaratory judgment or breach of contract action.

Such a new action must have its own independent basis of federal jurisdiction. For instance, if an antitrust action is settled for, say,

45. *Id.* at 423 (quoting *McCall-Bey v. Franzan*, 777 F.2d 1178, 1187 (7th Cir. 1985)).

46. *Libby, McNeill*, 895 F.2d at 423 (quoting *McCall-Bey*, 777 F.2d at 1188).

47. *Libby, McNeill*, 895 F.2d at 423 n.3.

48. *Id.* at 423 (citation omitted).

\$100,000 without the court retaining jurisdiction, and if the parties are not diverse, then any new action to enforce the settlement contract cannot lie in federal court. Similarly, if in the same situation the federal claim is compromised for less than \$50,000 and jurisdiction is not retained, then the action to enforce the settlement contract cannot lie in federal court, even if the parties are diverse.

D. Removal

Several removal issues were decided during the survey period. These are merely highlighted so that practitioners are aware of the developments:

1. The right to remove is not waived by opposing a motion for a temporary restraining order in state court; waiver is only an issue when "the suit is fully tried before the statutory period has elapsed and the defendant then files a petition for removal."⁴⁹

2. A district court's order remanding a removed action to state court on the basis of waiver is reviewable by way of mandamus, notwithstanding section 1447(d)'s prohibition against review of an "order remanding a case to the State court"⁵⁰

3. Section 1446(b)'s prohibition that "a case may not be removed on the basis of [diversity] . . . more than one year after commencement of the action" is jurisdictional and cannot be waived.⁵¹

4. The 30-day limit for filing a removal petition, although not jurisdictional, is mandatory and is a ground for remand unless waived.⁵²

E. The Party's Over for Pendent-Party Jurisdiction, At Least for a While Anyway

This author reported in last year's Article that after the United States Supreme Court's decision in *Finley v. United States*,⁵³ the very

49. *Rothner v. City of Chicago*, 879 F.2d 1402, 1415-16 (7th Cir. 1989). *See also* *Rose v. Giamatti*, 721 F. Supp. 906, 922-23 (S.D. Ohio 1989).

50. *Rothner*, 879 F.2d at 1405-15.

51. *Foiles by Foiles v. Merrell Nat'l Laboratories*, 730 F. Supp. 108 (N.D. Ill. 1989) (declining to follow *Gray v. Moore Business Forms, Inc.*, 711 F. Supp. 543 (N.D. Cal. 1989)).

52. *Houldson v. State Farm Fire & Casualty*, No. TH89-232-C, slip op. at 2-3 (S.D. Ind. Jan. 2, 1990) (citing *Northern Ill. Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 273 (7th Cir. 1982)).

53. 490 U.S. 545 (1989).

existence of pendent-party jurisdiction was in grave doubt.⁵⁴ Pendent-party jurisdiction arises when a plaintiff brings a federal question or diversity claim in federal court against one party, and brings a related state-law claim against another related party without an independent basis of federal jurisdiction. The doctrine had been called "embattled" by the Seventh Circuit,⁵⁵ and in *Finley* the Supreme Court effectively abolished the concept by requiring an affirmative grant of such jurisdiction in the federal statute that provides the basis of the main claim. Prior to *Finley*, the standard was whether the federal statute *negated* the exercise of pendent-party jurisdiction.⁵⁶

During the survey period, several cases addressed the issue of whether third-party indemnity actions that lack an independent jurisdictional basis can be maintained after *Finley*. Although some of the cases continue to find jurisdiction present in these settings,⁵⁷ the better-reasoned decisions (at least after *Finley*) hold that *Finley* forecloses this form of ancillary jurisdiction.⁵⁸ Indeed, as pointed out in last year's Article, even the Federal Courts Study Committee noticed *Finley* and suggested legislation to make pendent-party jurisdiction a statutory matter.⁵⁹ And, as this Article went to press, Congress recognized the effect of *Finley* by passing such legislation.⁶⁰

In the Seventh Circuit, several judges of the Northern District of Illinois have apparently overlooked the full ramifications of *Finley*. For instance, in *Armstrong v. Edelson*,⁶¹ Judge Holderman held that pendent-party jurisdiction may be exercised over state-law claims involving third parties when the main federal claim was based on the federal RICO statute. His discussion of the issue omits any reference to the different standard established in *Finley*:

54. See Maley, 1989 *Developments*, *supra* note 1, at 270-76.

55. See *Huffman v. Hains*, 865 F.2d 920, 922 (7th Cir. 1989).

56. *Id.* at 922-23; see also Maley, 1989 *Developments*, *supra* note 1, at 270-76.

57. See, e.g., *King Fisher Marine Serv., Inc. v. 21st Phoenix Corp.*, 893 F.2d 1155 (10th Cir. 1990); *Huberman v. Duane Fellows, Inc.*, 725 F. Supp. 204 (S.D.N.Y. 1989); *Olan Mills, Inc. v. Hy-Vee Food Stores, Inc.*, 731 F. Supp. 1416 (N.D. Iowa 1990).

58. See, e.g., *Aetna Casualty & Surety Co. v. Spartan Mechanical Corp.*, 738 F. Supp. 664 (E.D.N.Y. 1990); *Community Coffee Co. v. M/S Kriti Amethyst*, 715 F. Supp. 772 (E.D. La. 1989). See also *Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 n.5 (2d Cir. 1989) (noting effect of *Finley*); *Gould v. Pumel & Assoc.*, No. IP88-494-C, slip op. at 7 (S.D. Ind. Oct. 19, 1989) (following *Finley* and holding that pendent-party jurisdiction was unavailable over state-law claims).

59. See Maley, 1989 *Developments*, *supra* note 1, at 276 (citing *Tentative Report of the Federal Courts Study Committee*, summarized in 58 U.S.L.W. 2442, 2445 (Feb. 6, 1990)).

60. See *infra* notes 68-74 and accompanying text.

61. 718 F. Supp. 1372 (N.D. Ill. 1989).

The second factor . . . is whether Congress has *limited or negated* pendent jurisdiction in the RICO statute. . . . Nothing in the language of RICO indicates that Congress *intended to preclude* a plaintiff from bringing an action under a state consumer fraud statute as a pendent claim to a RICO claim.⁶²

After *Finley*, however, the search is for affirmative evidence of legislative intent to include pendent-party claims. Thus, the holding in *Armstrong* is based on out-dated standards.

A decision from Judge Bua of the Northern District of Illinois contains the same type of analysis. In *Carter v. Dixon*,⁶³ an arrestee and his wife brought claims against officers alleging a violation of his civil rights and a loss of her consortium. After removal, the defendants moved to dismiss the wife's state-law consortium claims, arguing that pendent-party jurisdiction was unavailable. The court denied the motion, following the pre-*Finley* standards set forth in *Huffman v. Hains*,⁶⁴ a Seventh Circuit decision that this author used in last year's survey Article to show the effect that *Finley* would have in the Seventh Circuit.⁶⁵

The district court inquired whether the statute granting jurisdiction over the civil rights claims "expressly or by implication *negated* the exercise of jurisdiction."⁶⁶ Of course, nothing in the civil rights statutes or the removal statutes had such negative divestitures of jurisdiction, so the court assumed pendent-party jurisdiction over the wife's state-law claims.

The *Carter* opinion is interesting because the court noted the *Finley* decision in a footnote, but wrote that *Finley* "did not totally reject the concept of pendent party jurisdiction,"⁶⁷ and that *Finley* was based "on its interpretation of the particular statute conferring federal jurisdiction in that case"⁶⁸ Both statements are true, but do not provide any logical support for the *Carter* holding.

First, as discussed in last year's Article, the Supreme Court effectively abolished pendent-party jurisdiction, not by saying, "This concept is dead," but by subtly altering the standards for invoking the doctrine. It was pointed out last year that this somewhat indirect approach to altering the concept was unfortunate. Indeed, the post-*Finley* decisions that have failed to incorporate the murky details of its holding show

62. *Id.* at 1376 (emphasis added).

63. 727 F. Supp. 478 (N.D. Ill. 1990).

64. 865 F.2d 920 (7th Cir. 1989).

65. See Maley, 1989 *Developments*, *supra* note 1, at 271-73.

66. *Carter*, 727 F. Supp. at 479 (emphasis added).

67. *Id.* at 479 n.1.

68. *Id.*

that a more direct, up-front opinion would have been helpful. Nonetheless, the standards *were* changed.

Second, that the *Finley* court was interpreting the "particular statute conferring federal jurisdiction in that case"⁶⁹ is of no moment, for that is what must occur in every pendent-party setting. Moreover, if anything, the particular statute involved in *Finley* was a better candidate for pendent-party jurisdiction because, unlike the civil rights claims brought in *Carter* under 42 U.S.C. § 1983 that can be maintained in state or federal court, federal tort claims under 28 U.S.C. § 1346 can only be maintained in *federal court*. In *Finley*, then, the court's decision forced the two related claims to be pursued in separate forums. In the *Carter* setting, though, the related claims can always be pressed together in state court.

Thus, *Carter* and *Armstrong* are, in this writer's opinion, at odds with the Supreme Court's decision in *Finley*. Indeed, although the Seventh Circuit has not addressed the new *Finley* standards to date, it has, in one of its few citations to *Finley*, noted that "a majority of the Supreme Court has recently expressed disfavor for pendent-party claims."⁷⁰

Practitioners in the Seventh Circuit are again warned of the subtle but dramatic effect of *Finley*. It remains this author's opinion that after *Finley*, the notion of implying pendent-party jurisdiction is not a viable concept. The *Finley* search for affirmative evidence should always be fruitless, for no such jurisdiction would need to be implied if the statutory basis of federal jurisdiction contained an affirmative grant of jurisdiction over related state law claims involving third parties.

As this Article went to press, Congress entered the foray by adopting the Federal Courts Study Committee's proposals and passing legislation on the subject (further showing that *Finley* did, in fact, effectively abolish pendent-party jurisdiction). Specifically, as part of the Judicial Improvements Act of 1990,⁷¹ Congress authorized the district courts to exercise "supplemental jurisdiction" over claims lacking an independent jurisdictional basis but that are sufficiently related to the federal claims.

The legislation provides in part:

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims

69. *Id.*

70. *Heritage Bank & Trust Co. v. Abdnor*, 906 F.2d 292, 302 (7th Cir. 1990) (affirming a discretionary dismissal of pendent-party claims).

71. Judicial Improvements Act of 1990, Pub. L. No. 101-650 (Dec. 1, 1990) (to be codified at 28 U.S.C. § 1367).

that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.⁷²

This new provision, which was signed into law by President Bush on December 1, 1990, gives the courts discretion to decline to exercise supplemental jurisdiction for reasons such as the presence of a novel or complex issue of state law, the predominance of the state claim over the federal claim, the dismissal of the federal claims, or other "compelling reasons" in "exceptional circumstances."⁷³ The section also tolls applicable limitations periods for thirty days for the dismissal of any supplemental claim.⁷⁴ These are both common sense provisions that will guide the district courts in exercising discretion to dismiss supplemental claims, and will ensure that such claims can then be refiled in state court without limitations problems.

The new section applies, by its own language, "to civil actions commenced on or after the date of the enactment of this Act."⁷⁵ Thus, the doctrine of pendent jurisdiction, including pendent-party jurisdiction, will be viable for all actions filed on or after the date of such enactment. However, for actions filed prior to the passage of the Act, *Finley* remains binding law such that pendent-party jurisdiction is unavailable.⁷⁶ Congress could have chosen to make the new Act retroactive, but it clearly did not.

Only two jurisdictional defenses to supplemental jurisdiction remain. The first is to assert that, as a factual matter, the state claim is not sufficiently related to the federal claim for purposes of Article III. Recall that the courts have generally spoken in terms of a "common nucleus of operative facts" as being the appropriate test here.⁷⁷ Because the new section seems to defer to the courts' standards in this respect, this standard should remain applicable.⁷⁸

72. *Id.* § 310(a).

73. *Id.* § 310(c).

74. *Id.* § 310(d).

75. *Id.* § 310(e).

76. See *Konradi v. United States*, 919 F.2d 1207, 1214 (7th Cir. 1990) (holding that *Finley* is to be applied retroactively).

77. See Maley, 1989 *Developments*, *supra* note 1, at 270-76.

78. Note that the new section does not state when a claim is sufficiently related for Article III purposes, it simply states that supplemental jurisdiction exists if the claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310 (Dec. 1, 1990) (to be codified at 28 U.S.C. § 1367).

The second defense, and the more difficult one, is to argue that supplemental jurisdiction is legally impermissible under Article III of the Constitution. Recall that the *Finley* court simply assumed for the sake of discussion that a federal court can exercise jurisdiction over pendent-party claims without violating Article III. The very notion of federal courts hearing pendent-party claims has been criticized as exceeding the "case or controversy" limits of the Constitution, and led the Seventh Circuit to call pendent-party jurisdiction an "embattled concept" in 1989.⁷⁹

That Congress has expressly authorized the courts to exercise such jurisdiction is an implicit indication that Congress finds no limitations to the concept in Article III. Whether the Supreme Court would agree were it ever to reach the issue is unknown. A full analysis of the issue is beyond the scope of this Article. For now, it is enough to simply point out that despite the new Act, there are possible defenses to supplemental jurisdiction.

F. Concurrent Jurisdiction

Finally, the Supreme Court resolved two lingering issues of whether particular federal-based claims can be maintained in state as well as federal court. In *Tafflin v. Levitt*,⁸⁰ the Court held that the state courts share concurrent jurisdiction with the federal courts over federal RICO actions. Later in *Yellow Freight System, Inc. v. Donnelly*,⁸¹ the Court similarly held the Title VII employment discrimination actions brought under 42 U.S.C. § 2000e may be maintained in federal or state court. The decisions are important to Indiana practitioners in that they offer an alternative forum for such actions.

II. SERVICE OF PROCESS

Imagine this scenario: A lawsuit against multiple parties is filed shortly before the statute of limitations expires, and attempts are made at service. All of the defendants are properly served except for one. However, in the barrage of appearances and motions for enlargement of time to answer or respond, and due to the responsibilities of an otherwise demanding caseload, the plaintiff's attorney is not aware of the failed service on the last defendant. Finally, some 125 days after the action was initiated, and now well after the expiration of the limitations period, the last defendant moves to dismiss, arguing that service was required within 120 days of the complaint.

79. *Huffman*, 865 F.2d at 920.

80. 110 S. Ct. 792 (1990).

81. 110 S. Ct. 1566 (1990).

The scenario is not improbable, and in past years was not a matter of great concern in federal court. Practitioners could usually rely on the district court's power to retain the action but quash the defective service, particularly when there was a reasonable prospect that the defendant would be served.⁸²

Any such feeling of security is no longer warranted, however, for Rule 4(j) of the Federal Rules of Civil Procedure mandates that if effective service is not obtained within 120 days of filing and the plaintiff cannot show good cause why such service was not made within that period, the action must be dismissed without prejudice.⁸³ Although Rule 4(j) has been in existence since 1983, its impact was never greater in the Seventh Circuit than during the survey period.

For instance, in *Floyd v. United States*,⁸⁴ the Seventh Circuit held that when an attorney's reason for not obtaining service within 120 days was the attorney's "busy schedule, combined with the unexpected absence of his secretary," good cause had not been shown for failing to effect timely service.⁸⁵ The court thus affirmed the dismissal of the action, even though it operated as an absolute bar because the limitations period had expired.⁸⁶

In so doing, the Seventh Circuit outlined the standards for finding "good cause" under the Rule, which are summarized as follows:

- "Good cause" determinations entail discretionary decisions that will not be disturbed absent an abuse of discretion.⁸⁷
- Dismissal is not mandated in every case in which the delay in service is caused in part by attorney inadvertence.⁸⁸
- Simple attorney neglect, without the presence of extenuating factors such as sudden illness or a natural disaster, cannot constitute the sole basis for good cause.⁸⁹

82. See, e.g., *Montalbano v. Easco Hand Tools*, 766 F.2d 737, 740 (2d Cir. 1985); *Novak v. World Bank*, 703 F.2d 1305, 1310 (D.C. Cir. 1983).

83. The rule reads, "If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule." FED. R. CIV. P. 4(j).

84. 900 F.2d 1045 (7th Cir. 1990).

85. *Id.* at 1046.

86. *Id.* at 1046 n.1.

87. *Id.* at 1046.

88. *Id.* at 1047.

89. *Id.*

- A statute of limitations problem will not serve to establish good cause because the focus is on why service was not obtained, rather than on what the effects of a dismissal would be.⁹⁰
- Lack of prejudice to the defendant, standing alone, does not constitute good cause for the same reason that the inquiry is why service was not obtained, not what the results of dismissal would be.⁹¹
- The lack of prejudice can, however, be a consideration when coupled with a "good cause" explanation of why service was not made.⁹²

The question, then, is what constitutes good cause? The Rule does not define the term, and the legislative history is of little help in that it only lists evasion of service as one example of good cause.⁹³ Beyond this, the best that can be offered is the general statement that good cause is extremely difficult to establish under Rule 4(j). The plaintiff bears the burden of proof to show good cause,⁹⁴ and the failure to follow the Federal Rules of Civil Procedure is ordinarily an insufficient excuse.⁹⁵

Two examples show the unique types of settings that can satisfy Rule 4(j)'s stringent standard. For instance, in *Sellers v. United States*,⁹⁶ the Seventh Circuit held that when the district court instructs the Marshal to serve papers for a prisoner, and the Marshal fails to complete service, good cause is automatically shown. Similarly, in *Patterson v. Brady*,⁹⁷ good cause was found when the plaintiff's failure to perfect service was attributable to an unusual situation. Specifically, the clerk's office had failed to provide the plaintiff with appointed counsel as required by certain statutes and rules, and had also failed, after volunteering to assist her in filing her initial papers, to inform her that service was required on both the Attorney General and the local United States Attorney in an action against the Secretary of the Treasury.

Good cause will rarely be found in 4(j) cases. Thus, practitioners initiating litigation should take extra steps to ensure that service is timely

90. *Id.* at 1048.

91. *Id.*

92. *Id.* See also *Lewellen v. Morley*, 875 F.2d 118 (7th Cir. 1990) (no good cause shown when failure to serve was due to shortcomings of plaintiff's attorney).

93. Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 1982 U.S. CODE CONG. & ADMIN NEWS (96 Stat. 2527) 4434, 4446 n.25.

94. *Geiger v. Allen*, 850 F.2d 330, 333 (7th Cir. 1988).

95. *Reynolds v. United States*, 782 F.2d 837, 838 (9th Cir. 1986); *Barco Arroyo v. Federal Emergency Management Agency*, 133 F.R.D. 46, 49 (D. P.R. 1986).

96. 902 F.2d 598 (7th Cir. 1990).

97. 131 F.R.D. 679 (S.D. Ind. 1990).

made. At the very least, the 120-day limitation should be diaried several times before it expires, such as at 50, 100, 110, 115, and 120 days.

III. PERSONAL JURISDICTION

Although not a subject confined to federal courts, the issue of personal jurisdiction often arises in federal litigation, particularly given the large number of diversity cases filed against out-of-state defendants. A personal jurisdiction case decided by the Supreme Court during the survey period did not arise in federal court, but nonetheless will apply and is instructive here.

In *Burnham v. Superior Court of California*,⁹⁸ the Supreme Court squarely held that service upon non-residents while they are temporarily in the state is constitutionally permissible, even if the non-resident's entry into the state is unrelated to the issues raised in the lawsuit. All nine Justices agreed with this holding, although no less than four separate opinions were delivered discussing its rationale.⁹⁹

It is unnecessary to dissect the various opinions given the unanimity of the judgment. As Justice Stevens explained in a one-paragraph concurrence, "[I]t is sufficient to note that the historical evidence and consensus [on the issue] identified by Justice Scalia, the considerations of fairness identified by Justice Brennan, and the common sense displayed by Justice White, all combine to demonstrate that this is, indeed, a very easy case."¹⁰⁰

All that needs to be said is that non-residents can be served while present in the forum state, regardless of the reason for the presence. The only conceivable exception raised by *Burnham* is when that presence is unintentional, which, as Justice White pointed out, is the rare exception.¹⁰¹ Thus, although one can imagine a scenario in which a non-resident unintentionally ends up in the forum, (for instance, when a non-resident is rendered unconscious in an automobile accident and is

98. 110 S. Ct. 2105 (1990).

99. *Id.* Justice Scalia announced the judgment of the Court and delivered an opinion joined by the Chief Justice and by Justice Kennedy, with Justice White joining in part and concurring separately in part and concurring in the judgment. Justice Brennan, joined by Justices Marshall, Blackmun, and O'Connor filed an opinion concurring in part and concurring in the judgment. Justice Stevens filed an opinion concurring in the judgment.

100. *Id.* at 2126 (Stevens, J., concurring in the judgment). Justice Stevens added in a footnote, "Perhaps the adage about hard cases making bad law should be revised to cover easy cases." *Id.*

101. *Id.* at 2120 (White, J., concurring in part and concurring in the judgment) ("[C]laims in individual cases that the rule would operate unfairly as applied to the particular non-resident involved need not be entertained. At least this would be the case where presence in the forum state is intentional, which would almost always be the fact."). *Id.*

transported across state lines without his or her knowledge for medical care), most of the time no inquiry need be made into why the non-resident appeared in the forum state. The mere presence is enough under the Due Process Clause.

IV. RULE 55 - DEFAULTS

Rule 55(a) provides that the clerk shall enter a default when a party has failed to respond to an action and that fact is made to appear by affidavit or otherwise.¹⁰² Judgment by default is then made upon request by the clerk when the claim is for a sum certain, and by the court upon request in all other cases.¹⁰³ The clerk's entry of default can be set aside by the court only for "good cause shown," and a judgment by default can be set aside only in accordance with Rule 60(b).¹⁰⁴

During the survey period, the Seventh Circuit issued several opinions dealing with setting aside entries of default and default judgments. For instance, in *In re State Exchange Finance Co.*,¹⁰⁵ the Seventh Circuit held that the trial court did not err in refusing to set aside a default, even though the answer was filed only two weeks late. Indeed, Judge Posner wrote that "even if the answer is filed two minutes late, if a default is entered the defendant cannot get it set aside without showing that he had good cause for the default [under Rule 55(c)]."¹⁰⁶ Judge Posner found good cause lacking because the evidence showed that the defendant and his lawyer both had proper notice of the suit more than a month before an answer was filed.¹⁰⁷

The court's discussion of the new attitude towards defaults is instructive:

Traditionally, default judgments were strongly disfavored; however, "this court has moved away from the traditional position . . . ; we are increasingly reluctant to reverse refusals to set them aside." *Dimmitt & Owens Financial, Inc. v. United States*, 787 F.2d 1186, 1192 (7th Cir. 1986). To the cases cited in *Dimmitt*, we may now add our more recent cases of *Hal Commodity Cycles Management Co. v. Kirsh*, 825 F.2d 1136 (7th Cir. 1987); *North Central Illinois Laborer's District Council v. S.J. Groves & Co.*, 842 F.2d 164 (7th Cir. 1988); *United States v. Di Mucci*,

102. FED. R. CIV. P. 55(a).

103. FED. R. CIV. P. 55(b).

104. FED. R. CIV. P. 55(c).

105. 896 F.2d 1104 (7th Cir. 1990).

106. *Id.* at 1106.

107. Judge Posner seemed particularly distraught at the defendant's delay because the defendant himself was a lawyer.

879 F.2d 1488, 1493-96 (7th Cir. 1989). The old formulas - a harsh sanction, drastic, should be imposed only as a last resort, for example when other, less drastic remedies prove unavailing, etc. - are still at times intoned. The new practice, however, is different. The entry of a default judgment is becoming - without interference from this court - a common sanction for late filings by defendants, especially in collection suits such as this against sophisticated obligors.¹⁰⁸

Judge Posner used similar language in *Connecticut National Mortgage Co. v. Brandstatter*,¹⁰⁹ even though the end result was different. The *Brandstatter* case is unique in that the defendant's answer was overdue, but the plaintiff had informed the defendant that a motion for entry of default and for entry of judgment would be made at a status hearing on July 12th. The defendant's attorney arrived at court that day, filed his answer in the clerk's office, and proceeded to Judge Conlon's courtroom for hearing, whereupon he discovered that, without notice, Judge Conlon had vacated the hearing and entered a default judgment.

The Seventh Circuit reversed the judgment below and remanded the case for further proceedings for the "fundamental reason" that Judge Conlon had not even considered the defendant's motion to file an untimely answer. The court stated, "To grant such a motion the judge would not have had to find good cause or excusable neglect [as in the default settings], although some finding, however attenuated, of either would be implicit in favorable action on the motion."¹¹⁰

In so ruling, the Seventh Circuit noted that if the case had turned on whether excusable neglect had been shown under Rule 60(b)(1) to set aside the default judgment, the defendant would not have prevailed

108. *Id.* A seemingly contrary analysis was embraced by the Seventh Circuit in *Beeson v. Smith*, 893 F.2d 930 (7th Cir. 1990). There it was held that a decision that the court labeled a "default," which was actually a dismissal of the plaintiffs' action for want of prosecution, was an abuse of discretion when the dismissal was the result of the attorney's "repeated mishandling" of the case. As discussed later in the Rule 41(b) context, the *Beeson* decision must be questioned in light of the trend in the Seventh Circuit, as demonstrated in *State Exchange Finance Co.*, to hold parties accountable for the failings of their counsel. *See also* *Daniels v. Brennan*, 884 F.2d 783 (7th Cir. 1989) ("a client who independently chooses his counsel is bound by that counsel's acts . . ."). *Id.* at 788. *But see* *Del Carmen v. Emerson Elec. Co.*, 908 F.2d 158 (7th Cir. 1990) (reversing dismissal because counsel's single failure to attend status conference did not "satisfy the threshold showing of delay, contumacious conduct, or failed prior sanctions . . ."). *Id.* at 163. For now it is sufficient to point out that *Beeson* is not, contrary to the language of the opinion, a default case involving Rule 55, and to note that *Beeson* was written by a Senior District Judge from another circuit.

109. 897 F.2d 883 (7th Cir. 1990).

110. *Id.* at 885.

because "routine back-office problems . . . do not rank high in the list of excuses for default and certainly do not *require* a district judge to relieve a party from a default judgment."¹¹¹ Judge Posner then explained the difference between a default order entered by the clerk under Rule 55(a), and the subsequent default judgment made under Rule 55(b):

It is true that relief from a default order requires a showing of good cause, Fed. R. Civ. P. 55(c), that "good cause" is not sharply distinguishable from "excusable neglect," if it is distinguishable at all, *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 231-32 (7th Cir. 1990), and that some decisions, illustrated by *United States v. DiMucci*, 879 F.2d 1488, 1493 n.9 (7th Cir. 1989), imply that the standards for setting aside a default are the same under Rule 55(c) and 60(b). Most decisions, however, hold that relief from a default judgment requires a stronger showing of excuse than relief from a mere default order. [listing authorities]. Such an order is normally entered by the clerk of the court automatically upon the failure to file a timely pleading. Fed. R. Civ. P. 55(a). And as it does not conclude the lawsuit, the practical considerations that support a strong presumption against the reopening of final decisions are not in play. The defendant in this case was denied an opportunity to argue that a default judgment should not be entered, but instead was forced to bear the heavier burden of showing that a judgment already entered should be set aside.¹¹²

The lessons from these cases are two-fold. First, *always* respond to complaints on time and avoid the entry of a default order by the clerk. There is no excuse for failing to at least file a motion for enlargement of time, except for extraordinary situations such as natural disasters and the like. As is equally true in the Rule 4(j) setting, "good cause" does not mean that counsel was busy in trial or that a secretary forgot to diary the deadline.

Second, if a default is entered, act *immediately* to preclude the entry of a default judgment under Rule 55(b). Once such a judgment is entered, the availability of relief via Rule 60(b) is virtually foreclosed, as the Seventh Circuit has made clear.

V. RULE 9(B) - PLEADING WITH PARTICULARITY

Rule 9(b) requires "all averments of fraud or mistake" to be "stated with particularity."¹¹³ During the survey period, the Seventh Circuit

111. *Id.* at 884-85 (emphasis added).

112. *Id.* at 885 (citations omitted).

113. FED. R. CIV. P. 9(b).

discussed Rule 9(b) in *Flynn v. Merrick*,¹¹⁴ holding that “cryptic statements” found in a fraud complaint were insufficient.¹¹⁵ The court wrote, “Mere allegations of fraud, corruption or conspiracy, averments to conditions of mind, or referrals to plans and schemes are too conclusional to satisfy the particularity requirement, no matter how many times such accusations are repeated.”¹¹⁶

Thus, care must be taken in fraud cases to detail the factual basis of the claims. Merely repeating the conclusory allegation that fraud occurred will not suffice.

VI. RULE 13(A) - COMPULSORY COUNTERCLAIMS

Rule 13(a) requires “compulsory counterclaims” to be asserted at the time of filing the responsive pleading if the counterclaim “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of when the court cannot acquire jurisdiction.”¹¹⁷ In *Burlington Northern Railroad Co. v. Strong*,¹¹⁸ the Seventh Circuit held that an employer’s claim for set-off under a disability insurance program was not a compulsory counterclaim that needed to be filed in response to the employee’s personal injury claim against the employer. This holding, by itself, is not particularly noteworthy.

The court’s opinion, however, contains an excellent analysis of the standards for compulsory counterclaims. The court noted that “Rule 13(a) is in some ways a harsh rule: if a counterclaim is compulsory and the party does not bring it in the original lawsuit, that claim is thereafter barred.”¹¹⁹ However, “the rule serves a valuable role in the litigation process, especially in conserving judicial resources.”¹²⁰

In determining whether a counterclaim arises out of the same transaction or occurrence, the court wrote that the Seventh Circuit has developed a “logical relationship” test. Under this test, the words “transaction or occurrence” are liberally interpreted to further the general policies of the federal rules. The court stated, “Despite this liberal construction, [the Seventh Circuit] has stressed that [the] inquiry cannot be a wooden application of the common transaction label. Rather, [the court] examine[s] carefully the factual allegations underlying each claim

114. 881 F.2d 446 (7th Cir. 1989).

115. *Id.* at 449.

116. *Id.* (quoting *Hayduk v. Lanna*, 775 F.2d 441, 444 (1st Cir. 1985)).

117. FED. R. CIV. P. 13(a).

118. 907 F.2d 707 (7th Cir. 1990).

119. *Id.* at 710 (quotations and footnote omitted).

120. *Id.*

to determine if the logical relationship test is met.”¹²¹ The court concluded, “In short, there is no formalistic test to determine whether suits are logically related.”¹²² Instead, “[a] court should consider the totality of the claims, including the nature of the claims, the legal basis for recovery, the law involved, and the respective factual backgrounds.”¹²³

Thus, when responding to complaints, defendants should determine whether any counterclaims can be asserted. If such claims exist, a focused analysis of whether such counterclaims are compulsory is necessary. The standard used by the courts is admittedly inexact, so practitioners should err on the side of treating a counterclaim as compulsory when there is room for doubt.

VII. RULE 15 - AMENDMENT OF PLEADINGS

Rule 15 allows pleadings to be amended in three situations: (1) as a matter of right at any time before a responsive pleading is served; (2) by leave of court or written consent of the adverse party thereafter; or (3) during or after trial via an amendment to conform to the evidence when issues not raised by the pleadings are tried by express or implied consent of the parties.¹²⁴ During the survey period, the Seventh Circuit rendered important decisions involving the last two situations.

These decisions are merely highlighted below so that practitioners are aware of them:

1. A district court did not abuse its discretion in denying amendment by consent of the parties when the amendment was to be conditioned on reopening discovery, the case had already been tried once, and the district court was properly concerned with “artificial protraction of [the] litigation.”¹²⁵
2. A district court did not abuse its discretion in allowing amendment at the close of plaintiff’s evidence to allow plaintiff to include, in a free-speech claim, an allegation of retaliation by superiors — defense counsel did not formally object to a remark of employee’s counsel that such an allegation was included, and defense counsel did not object to the introduction of evidence on the allegation at trial.¹²⁶

121. *Id.* at 711 (quotations and citations omitted).

122. *Id.*

123. *Id.* (footnote omitted).

124. FED. R. CIV. P. 15(a).

125. *Fort Howard Paper Co. v. Standard Havens, Inc.*, 901 F.2d 1373, 1379 (7th Cir. 1990).

126. *Barkoo v. Melby*, 901 F.2d 613, 617 (7th Cir. 1990). This shows the care that must be taken at trial to keep the evidence limited to the original pleadings. In *Barkoo*,

3. A district court did not abuse its discretion in denying amendment to plead a fraud claim when counsel should have been aware of the facts giving rise to the claim nineteen months previous.¹²⁷

4. Leave to amend cannot be granted after summary judgment has been granted and judgment entered until the judgment is first reopened via Rules 59 or 60.¹²⁸

VIII. TRANSFER (CHANGE OF VENUE)

Several important decisions were issued during the survey period dealing with transfer of an action to another district.¹²⁹ In *Ferens v. John Deere Co.*,¹³⁰ a sharply divided Supreme Court held that when an action is transferred to another district, the transferee court must apply the law of the transferor court, regardless of who initiated the transfer. The court had decided in 1964 that the transferor state's law applies when a defendant seeks transfer, but left unresolved whose law governs when the plaintiff obtains transfer.¹³¹ After *Ferens*, the law of the transferor state applies in both situations.

This decision has important forum-shopping considerations, as the facts of the case reveal. The plaintiff had been injured in Pennsylvania. Three years later, after Pennsylvania's two-year limitations period for torts had expired, plaintiff sued John Deere in a Pennsylvania federal court for breach of warranty, which invoked a longer limitations period. In a stroke of genius, plaintiff then filed a tort action against John Deere in a Mississippi federal court. This action was properly before the court on diversity, and venue was proper as well under 28 U.S.C.

the plaintiff's counsel remarked early in the trial that the free-speech claim included the allegation of retaliation. Although defense counsel said, "I do not think that is alleged," he did not "lodge a formal objection" and did not object to such evidence being admitted. *Id.*

127. *Amendola v. Bayer*, 907 F.2d 760, 764-65 (7th Cir. 1990). The district court had properly reasoned that this delay would prejudice the defendant and "impair the public interest in prompt resolution of legal disputes." *Id.*

128. *Id.* at 765 n.4.

129. Litigants in federal court may seek to transfer the action to another district under 28 U.S.C. § 1404. However, transfer is not automatic as it is in certain situations under Indiana Trial Rule 76, but is instead governed by the court's discretion in the interest of justice, taking into account the "convenience of parties and witnesses." 28 U.S.C. § 1404(a), (b) (1990).

130. 110 S. Ct. 1274 (1990). Justice Kennedy wrote the majority opinion and was joined by the Chief Justice and Justices White, Stevens, and O'Connor. Justice Scalia wrote a strong dissent, joined by the unlikely bedfellows Justices Brennan, Marshall, and Blackmun.

131. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

§ 1391(a) and (c).¹³² The Mississippi forum was chosen because Mississippi's choice-of-law rules¹³³ require Mississippi's statute of limitations to govern actions brought in Mississippi, and because Mississippi's limitations period for torts is six years.¹³⁴

Thus, by filing in Mississippi, the plaintiff was able to pursue a tort action that he could no longer maintain in Pennsylvania. The real savvy of plaintiff's counsel, however, was shown when he then filed a motion to transfer the action to a Pennsylvania federal court. This was done acting on the assumption that, after the transfer, the choice of law rules of Mississippi and the longer limitations period would apply. John Deere did not object to the transfer, no doubt concluding that the Pennsylvania forum was more convenient, and, it seems, without realizing the plaintiff's true motive. The federal court in Mississippi granted the transfer motion, as it should have under the standards of section 1404(a).

The end result was that the plaintiff obtained the convenient forum he desired, as well as application of favorable law that could not have been obtained by originally filing in Pennsylvania. The debate in the Supreme Court over the propriety of this result was intense,¹³⁵ but it is now the law of the land that the transferor's law applies in all transferred actions.

The lessons from *Ferens* are three-fold. First, plaintiffs who can invoke diversity jurisdiction are well advised to seek out the most favorable law possible among all the states. Of course, in most instances the substantive law of an unrelated forum will not apply because the forum's choice-of-law rules will dictate application of the law of the state that has the most significant contacts or where the tort occurred.¹³⁶

However, when there are concerns about limitation periods, the search could be fruitful because the majority of states apply the forum's statute

132. The plaintiff was not a resident of Mississippi and John Deere was neither incorporated nor based in Mississippi. Nonetheless, venue was proper because (presumably) John Deere was subject to personal jurisdiction in Mississippi. This is enough to allow venue, for § 1391(a) allows venue where (among other places) all defendants reside, and § 1391(c) provides that a corporation is deemed to reside in any judicial district in which it is subject to personal jurisdiction.

133. A diversity court applies the choice-of-law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

134. Mississippi has a borrowing statute like many states do, but it did not apply because the statute has been construed to govern only when a nonresident in whose favor the statute has accrued afterwards moves into the state. *Ferens*, 110 S. Ct. at 1278.

135. *Ferens*, 110 S. Ct. at 1284-88 (Scalia, J., dissenting).

136. As Justice Scalia noted in *Ferens*, the "diversity among the States in choice-of-law principles has become kaleidoscopic." *Id.* at 1287. Indeed, the current edition of a leading conflicts treatise lists 10 separate choice-of-law theories that are applied by the 50 states. *Id.* (citation omitted).

of limitations as a matter of course.¹³⁷ Thus, as in *Ferrens*, a plaintiff faced with an expired limitations period in the convenient forum might be able to find an open limitations period in an inconvenient forum, and then seek transfer to the convenient forum under section 1404(a).

Second, for defendants the lesson is to be on the lookout for such forum-shopping. When an action is filed in what seems like an improbable federal forum, it is likely that the plaintiff might have limitations problems and that, aware of *Ferrens*, the plaintiff might seek transfer back to a convenient forum. In most cases, nothing can be done about this because once the case is filed in such a forum the more favorable limitations will apply, regardless of whether transfer is effected. A defendant might well seek to block transfer, but in many cases the defendant will prefer the new forum as well. Moreover, if the initial forum is truly inconvenient for parties and witnesses, the district court is likely to transfer the action anyway. Thus, the best that can be hoped for here is legislative action to change this avenue of forum-shopping.

Third, if litigation involving potential compulsory counterclaims appears likely and a potential defendant is concerned that its adversary might utilize *Ferrens* forum-shopping, that "defendant" might want to consider filing its action first in a forum that would apply favorable limitations from the defendant's perspective. In so doing, this party could force the adversary to bring its action, if at all, in an undesirable forum from a limitations standpoint.

The Seventh Circuit also decided several important transfer cases during the survey period. For instance, in *Heller Financial, Inc. v. Midwhey Powder Co.*,¹³⁸ the plaintiff sought transfer of a case from a district that the parties had previously agreed upon in a contractual forum-selection clause. Judge Manion began by noting the settled rule that the existence of a forum-selection clause is not dispositive under section 1404(a) because only one of this section's factors, convenience of the parties, is within the parties' power to waive. "In other words, a valid forum-selection clause may waive a party's right to assert his own inconvenience as a reason to transfer a case, but district courts must still consider whether the 'interests of justice' or the 'convenience . . . of witnesses' require transferring a case."¹³⁹

137. See, e.g., *Hauch v. Connor*, 453 A.2d 1207, 1214 (Md. 1983) (Maryland courts apply the limitations period of the forum). The rule remains well entrenched, although it has been the subject of "considerable academic criticism," *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n.10 (1984), and "[m]any subsequent cases have taken a different view." RESTATEMENT (SECOND) OF CONFLICT § 142 comment "e" (1989). Note again, however, that the issue of a borrowing statute must also be considered.

138. 883 F.2d 1286 (7th Cir. 1989).

139. *Id.* at 1293.

Thus, despite the existence of a forum-selection clause, courts may still transfer a case under section 1404(a). Nonetheless, in *Heller Financial* the Seventh Circuit found that transfer was properly denied because the defendant had waived its own inconvenience as a factor by virtue of the clause, and because the defendant did not meet its burden to otherwise specifically show that witnesses would face difficulty in the initial forum.

Thus, forum-selection clauses are entitled to some weight in the transfer analysis. However, practitioners should advise their clients that the interests of other parties or witnesses can override such a clause.

IX. RULE 41(A) - VOLUNTARY DISMISSAL

Rule 41(a) provides for voluntary dismissal of an action at the plaintiff's request in three situations: (1) by the plaintiff's notice of a dismissal at any time before the service of an answer or motion for summary judgment;¹⁴⁰ (2) by stipulation of the parties;¹⁴¹ or (3) by court order upon such terms and conditions as the court deems proper.¹⁴² An excellent example of the third setting arose during the survey period.

In *Belkow v. Celotex Corp.*,¹⁴³ an alleged victim of asbestos exposure sued various defendants for damages in an eight-count complaint. Defendants sought to dismiss five of the counts, and plaintiff responded by seeking voluntary dismissal of three of those five counts without prejudice. The district court granted the plaintiff's motion in a well-written opinion. Judge Kocoras of the Northern District of Illinois first noted that voluntary dismissals by court order under Rule 41(a)(2) are within the sound discretion of the court. Judge Kocoras wrote, "In exercising its discretion, a court must seek to prevent prejudice to the non-moving parties . . . however, the legitimate interests of both the plaintiffs and defendants must be considered."¹⁴⁴ Dismissal is thus "typically allowed unless the defendants will suffer some legal prejudice beyond the potential for further litigation."¹⁴⁵

Based on these principles, the court found the voluntary dismissal proper, writing, "Although the defendants may witness the subsequent resurrection of these claims, as plaintiffs have indicated their intention to move to amend, the prospect of facing these resurrected claims is not sufficiently prejudicial to bar a voluntary dismissal."¹⁴⁶ "Similarly,"

140. FED. R. CIV. P. 41(a)(1)(i).

141. FED. R. CIV. P. 41(a)(1)(ii).

142. FED. R. CIV. P. 41(a)(2).

143. 722 F. Supp. 1547 (N.D. Ill. 1989).

144. *Id.* at 1552-53 (citations omitted).

145. *Id.* at 1553 (citations omitted).

146. *Id.* (citations omitted).

the court added, “any technical advantage plaintiffs may gain fails to constitute sufficient prejudice.”¹⁴⁷ The court also noted that plaintiff had raised the motion early in the proceedings and had otherwise been diligent.¹⁴⁸

The court then rejected a defense argument that the dismissal be with prejudice, noting that the dismissal should be without prejudice “unless the court finds that the defendant will suffer legal prejudice.”¹⁴⁹ The court then disposed of the defendant’s request that costs be imposed against the plaintiff as part of the “terms and conditions” referred to in Rule 41(a)(2).¹⁵⁰ Although noting that costs are sometimes awarded when there is a threat of relitigation, the court concluded that costs were inappropriate because plaintiff sought dismissal of only three claims. Thus, any “work product defendant . . . generated [wa]s not wasted but useful and relevant to the rest of the litigation.”¹⁵¹ “Furthermore,” the court wrote, “if defendant has incurred expense for work that is wasted, it has not specified that amount.”¹⁵²

The *Belkow* decision thus illustrates that plaintiffs can seek voluntary dismissal of claims that appear threatened by defense motions. The earlier that such Rule 41(a)(2) motions are filed, the better the prospects of success are. Defendants opposing such motions should routinely seek costs as a condition of dismissal, but should be prepared to specifically demonstrate what costs are essentially “wasted expense[s]”¹⁵³ due to the dismissal.

X. RULE 41(B) - INVOLUNTARY DISMISSAL

Rule 41(b) provides for the involuntary dismissal of an action or any claim for failure to prosecute or to comply with the federal rules or an order of the court.¹⁵⁴ Unless otherwise specified in the dismissal order, a Rule 41(b) dismissal “operates as an adjudication upon the merits.”¹⁵⁵

The Seventh Circuit issued no less than six decisions dealing with involuntary dismissals. The principles espoused in these cases are outlined as follows:

147. *Id.* (citations omitted).

148. *Id.*

149. *Id.* (quotations and citations omitted).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. FED. R. CIV. P. 41(b).

155. *Id.*

1. Dismissal is warranted when there is a "clear record of delay or contumacious behavior."¹⁵⁶
2. A client who independently chooses his or her counsel is bound by that counsel's acts,¹⁵⁷ particularly when the client is aware of the attorney's acts.¹⁵⁸
3. The district court has the inherent authority to dismiss a case *sua sponte* for failure to prosecute, without motion by a defendant under basically the same rationale and standards as Rule 41(b).¹⁵⁹
4. If the district judge does not state whether the dismissal is with or without prejudice, Rule 41(b) dictates that it is with prejudice; the Rule puts the burden on the plaintiff to take action to have the trial court specify otherwise.¹⁶⁰
5. A trial court's discretionary order dismissing a case for failure to prosecute will not be disturbed unless "it is clear that no reasonable person could concur in the trial court's assessment of the issue under consideration."¹⁶¹

XI. DISCOVERY

The decision in *Henderson v. Zurn Industries*,¹⁶² addresses a number of discovery issues that are often given "short shrift." The central issue was whether a request for production served upon a party required the

156. *Daniels v. Brennan*, 887 F.2d 783, 785 (7th Cir. 1990).

157. *Id.* at 788 (per Judge Kanne).

158. *Anderson v. United Parcel Serv.*, 915 F.2d 313, 315-16 (7th Cir. 1990) (per Judge Wood). These decisions seem more persuasive than *Beeson v. Smith*, 893 F.2d 930 (7th Cir. 1990), in which a Senior District Judge from Pennsylvania, sitting by designation, wrote for the Seventh Circuit and held that a dismissal should have been vacated when "the appellants themselves [did not] engage[] in any sophisticated contumacious scheme to delay the course of justice." *Id.* at 931. The *Beeson* decision does not square with the usual Seventh Circuit dogma that the "remedy for a client who suffers a dismissal because of the negligence of his attorney is a malpractice action; the remedy is not in avoiding the consequences of a freely selected agent." *Daniels*, 887 F.2d at 788. However, another panel of the Seventh Circuit, in an opinion written by Judge Coffey, has embraced *Beeson* and found an involuntary dismissal improper when counsel's only failing was a one-time failure to attend a status conference. *Del Carmen v. Emerson Elec. Co.*, 908 F.2d 158 (7th Cir. 1990). See also *Lowe v. City of East Chicago, Ind.*, 897 F.2d 272 (7th Cir. 1990) (reversing a Rule 41(b) dismissal when there was "no sign of either client neglect of court processes or knowledge of the attorney's neglect"). *Id.* at 274.

159. *Daniels*, 887 F.2d at 787.

160. *LeBeau v. Taco Bell*, 892 F.2d 605, 608 (7th Cir. 1989).

161. *Daniels*, 887 F.2d at 785. This standard of review does not seem to have been applied by the court in *Beeson*.

162. 131 F.R.D. 560 (S.D. Ind. 1990).

production of the insurance files of that party's insurer. The most important points of the decision are summarized below:

1. A three-part analysis is appropriate when a request for production essentially seeks discovery from a nonparty. First, are the files of the nonparty even reachable under the discovery provisions? Second, assuming that the nonparty's files can be reached by a request for production, are the items requested within the permissible scope of discovery (that is, are they reasonably calculated to lead to the discovery of admissible evidence)? Third, even if the items requested are within the scope of discovery, are they excluded under the work-product doctrine?¹⁶³
2. Under the federal version of Rule 34, only parties may be served with requests for production. The court stated, "The text of the Rule"¹⁶⁴ and "scores of cases make clear [that] a request for production simply cannot be made and enforced against a nonparty."¹⁶⁵ This contrasts with Indiana's version of Rule 34, under which nonparties can be served with requests for production in order to expedite and simplify the discovery process as it relates to nonparties.¹⁶⁶
3. The insurer in *Henderson* was not a "party" to the action because it was not named in the caption of the complaint as Rule 10(a) requires,¹⁶⁷ nor was it served with a copy of the summons and complaint as Rule 4 requires.¹⁶⁸
4. The line of district court decisions holding that a nonparty

163. *Id.* at 564.

164. Rule 34(a) states that "[a]ny party may serve on any other party a request [for production]" FED. R. CIV. P. 34(a).

165. *Henderson*, 131 F.R.D. at 564 n.1 (citing *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir. 1985) ("Rule 34 may not be used to discover matters from a non-party"); *Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1341 (8th Cir. 1975) (Rule 34 applies only to parties); *Wimes v. Eaton Corp.*, 573 F. Supp. 331, 333 (E.D. Wis. 1983) (noting that the drafters of Rule 34 "deliberate[ly] . . . limited the applicability of the rule to parties only").

166. See IND. R. TR. P. 34(c); 1 W. HARVEY, INDIANA PRACTICE 4, 9 (1988) (discussing rule). Note that documents from a federal nonparty can nonetheless ordinarily be obtained by way of a deposition and subpoena under Rule 45. Usually the deposition is unnecessary and, with the parties' consent, can be waived in lieu of simple production of the desired documents.

167. FED. R. CIV. P. 10(a).

168. FED. R. CIV. P. 4. See also *Welling, Discovery of Nonparties' Tangible Things Under the Federal Rules of Civil Procedure*, 59 NOTRE DAME L. REV. 110 (1983). "It is usually easily discernable who the parties are because their names must be listed in the summons and complaint." *Id.* at 112 n.8.

insurer is nonetheless subject to Rule 34 "under the theory that the insurer is virtually a party to the action"¹⁶⁹ is unavailing. Although these decisions have the virtue of facilitating discovery, the text of the Federal Rules cannot be rewritten to avoid inefficiencies that they might produce.

5. Rule 34(a) does have an agency aspect to it, though, because it allows discovery of documents that "are in the possession, custody or control of the party upon whom the request is served"¹⁷⁰

6. In applying Rule 34(a)'s control test, the courts look to whether the party has "the legal right to obtain the documents requested upon demand."¹⁷¹ In the insurance setting, the focus is on the contract between the insured and the insurer, and on the relevant state law regarding whether the insured has the legal right to obtain various materials held in the insurer's files.

7. The work-product doctrine embodied in Rule 26(b)(3) depends on whether, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation While litigation need not be imminent, the primary motivating purpose behind the creation of the document must be to aid in possible future litigation."¹⁷²

8. The burden is on the party asserting the work-product doctrine to prove that some articulable claim, likely to lead to litigation, has arisen.¹⁷³

9. In the liability-insurance setting, there should be no *per se* rules that documents prepared at the onset by a claims adjuster are covered by the doctrine; each case should be decided on its own facts.¹⁷⁴

Several decisions involving sanctions under Rule 37 for failure to provide discovery were rendered during the survey period. These are similarly highlighted below:

169. *Henderson*, 131 F.R.D. at 565 (declining to follow *Simper v. Trimble*, 9 F.R.D. 598 (W.D. Mo. 1949); *Bingle v. Liggett Drug Co.*, 11 F.R.D. 593 (D. Mass. 1951); *Wilson v. David*, 21 F.R.D. 217 (W.D. Mich. 1957); *State Farm Ins. Co. v. Roberts*, 97 Ariz. 169, 398 P.2d 671 (1965)).

170. *Henderson*, 131 F.R.D. at 567 (quoting FED. R. CIV. P. 34(a)).

171. *Id.* (quotations and citations omitted).

172. *Id.* at 570 (quoting *Binks Mfg. Co. v. National Presto Indus.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983) (citations omitted)).

173. *Id.*

174. *Id.* at 571 n.11.

1. A district court did not abuse its discretion in defaulting defendants for failing to obey discovery orders and failing to appear for noticed depositions.¹⁷⁵
2. A district court is not required to first impose less drastic sanctions as a warning shot prior to a default or dismissal for discovery violations.¹⁷⁶
3. Remedial actions taken after a default do not excuse the sanctionative conduct.¹⁷⁷
4. For every discovery violation, Rule 37(d) requires the offending parties or their counsel, or both, to pay the reasonable expenses and fees caused by the violation, unless the court finds the failure substantially justified or that other circumstances make an award unjust.¹⁷⁸

XII. SUMMARY JUDGMENT

The important liberalization of summary judgment practice was discussed at length in each of the last two survey Articles.¹⁷⁹ The courts continued to look favorably upon well-grounded summary judgment motions during the survey period. Some of the more significant decisions are summarized below so that practitioners are aware of them. Those seeking a more complete review of the fundamentals of summary judgment are referred to the previous Articles.

1. A nonmovant cannot defend a summary judgment motion with affidavits based on rumor or conjecture; affidavits must be based on personal knowledge, and testimony based on "gut feeling" is insufficient.¹⁸⁰
2. Contract interpretation is a subject particularly suited to disposition by summary judgment.¹⁸¹
3. Issues of motive and intent are generally, but not always,

175. *United States v. DiMucci*, 879 F.2d 1488, 1493-94 (7th Cir. 1989).

176. *Id.* at 1493-95; *Toombs v American Live Stock Ins. Co.*, No. IP89-912-C, slip op. at 5 (S.D. Ind. April 4, 1990).

177. *DiMucci*, 879 F.2d at 1495.

178. *Toombs*, No. IP89-912-C, slip op. at 6.

179. See Maley, 1988 *Developments*, and Maley, 1989 *Developments*, *supra* note 1.

180. *Palucki v. Sears, Roebuck and Co.*, 879 F.2d 1568, 1572 (7th Cir. 1990). See also *Shepley v. E.I. DuPont De Nemours and Co.*, 722 F. Supp. 506 (C.D. Ill. 1989), "Plaintiff's affidavit states that she has personal knowledge of the matters attested to but ultimately states that her knowledge of such was 'related to' her by another employee. Therefore, it is beyond dispute that the affidavit is not based on personal knowledge." *Id.* at 514-15.

181. *Dribeck Importers v. G. Heileman Brewing Co.*, 883 F.2d 569, 573 (7th Cir. 1989).

matters for the trier of fact; summary judgment is proper if no reasonable juror could find for the nonmovant at trial.¹⁸²

4. The issue at summary judgment involving an issue requiring expert testimony is not whether a "superrational jury" composed of experts could find for the nonmovant, but whether a normal jury could so find.¹⁸³

5. Even in *pro se* prisoner cases, although the court must liberally construe pleadings, the court cannot act as the prisoner's lawyer, and must enter summary judgment when appropriate.¹⁸⁴

6. A continuance under Rule 56(f) for discovery to rebut a summary judgment motion need not be granted if the nonmovant seeks discovery solely on issues not necessary to rebut summary judgment, or if the nonmovant's failure to obtain the needed materials is a result of the party's lack of diligence.¹⁸⁵

7. Attacks on the admissibility of summary judgment evidence are waived if not raised in the trial court.¹⁸⁶

8. A summary judgment order, without more, does not constitute an entry of judgment under Rule 54(b); thus, a summary judgment ruling can be reconsidered at any time before entry of judgment.¹⁸⁷

9. The failure to follow a district court's local rules on summary judgment can result in a summary grant or denial of summary judgment (particularly in the Northern District of Illinois).¹⁸⁸

182. *Hamann v. Gates Chevrolet, Inc.*, 910 F.2d 1417, 1420 n.4 (7th Cir. 1990).

183. *Krist v. Eli Lilly and Co.*, 897 F.2d 293, 299 (7th Cir. 1990).

184. *Bony v. Brandenburg*, 735 F. Supp. 913, 914 (S.D. Ind. 1990).

185. *Colby v. J.C. Penney Co.*, 128 F.R.D. 247, 249 (N.D. Ill. 1989). The *Colby* case is an excellent example of how *not* to conduct discovery and respond to summary-judgment motions.

186. *Whetstone v. Gates Rubber Co.*, 895 F.2d 388, 392 (7th Cir. 1990) (attacks on expert's opinion were "not raised in the court below, and thus were waived on appeal"); *Zayre Corp. v. S.M. & R. Co.*, 882 F.2d 1145, 1150 (7th Cir. 1989).

"We do not raise the authenticity and hearsay arguments that [appellant] raises on appeal, however, because there is a fundamental problem with those arguments: [appellant] did not raise them in the district court. An evidentiary objection not raised in the district court is waived on appeal, Fed. R. Evid. 103(a)(1); and this rule holds as true for a summary judgment proceeding as it does for trial."

Id.

187. *Continental Casualty Co. v. Great American Ins. Co.*, 732 F. Supp. 929, 931-32 (N.D. Ill. 1990); *Marvin v. King*, 734 F. Supp. 346, 351 (S.D. Ind. 1990). "[T]he Court has the power to reconsider its summary-judgment ruling as no final judgment was entered at that point. . . . Although the Court does not set aside the law of the case lightly, it must do so where, as here, it is apparent that a prior ruling requires reconsideration and the Court still has jurisdiction to do so." *Id.*

188. *Bell, Boyd & Lloyd v. Tapy*, 896 F.2d 1101, 1103 (7th Cir. 1990) (non-movant's

XIII. CONTINUANCES

In *Mraovic v. Elgin, Joliet & Eastern Railway Co.*,¹⁸⁹ the Seventh Circuit held that the district court did not abuse its discretion in denying an eleventh-hour motion to continue trial. The decision is noteworthy for showing that practitioners who delay in preparing for trial, in the hopes that the trial date is not firm, face the risk of going to trial unprepared.

The decision also contains the following summary of the standards for review of a district court's decision on a motion for continuance:

District courts have wide discretion to control their docket by granting or denying motions to continue. *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265, 269 (7th Cir. 1986). When reviewing challenges for abuse of discretion in district court scheduling, we have concluded that "[m]atters of trial management are for the district judge; we intervene only when it is apparent that the judge has acted unreasonably. The occasions for intervention are rare." *Id.*¹⁹⁰

Practitioners are thus well advised to learn the trial judge's practices on the firmness of trial dates, but never to take a trial date lightly. If a continuance must be sought, the motion should be supported by affidavits to show the absolute necessity of a continuance. Only in extraordinary circumstances is a continuance guaranteed.¹⁹¹

XIV. TRIAL¹⁹²

Two decisions from the survey period show the types of issues that can and cannot be waived at trial. The teachings of these decisions are summarized below:

failure to provide specific references to record that were required by local rule warranted grant of summary judgment, even assuming district judge (Judge Norgle) had discretion not to enforce local rule to the hilt); *Mustfov v. Superintendent of Chicago Police Dept.*, 733 F. Supp. 283, 287 (N.D. Ill. 1990) (Judge Aspen deems movant's statement of facts admitted when nonmovant did not file a statement in response as required by local rules); *Three D. Departments, Inc. v. K Mart Corp.*, 732 F. Supp. 901, 902-03 (N.D. Ill. 1990) (Judge Duff denies summary judgment because of movant's failure to comply with local rules); *United States E.E.O.C. v. Tempel Steel Co.*, 723 F. Supp. 1250, 1251 (N.D. Ill. 1989) (same) (Judge Aspen). *See also* *Simpson Oil Co. v. Quality Oil Co.*, 723 F. Supp. 382, 385 (S.D. Ind. 1989) (Judge Tinder denies motion to dismiss due to movant's failure to file a supporting brief as required by local rules).

189. 897 F.2d 268 (7th Cir. 1990).

190. *Id.* at 270-71.

191. *See, e.g.,* *Lowe v. City of East Chicago, Ind.*, 897 F.2d 272, 275 (7th Cir. 1990) (denial of continuance and dismissal for failure to prosecute reversed when client was not to blame for attorney's failure to notify client of trial date and otherwise prepare case for trial).

192. Most trial issues involve evidentiary questions, and with this year's Evidence

1. A party that fails to specifically object to an instruction waives any error stemming from the instruction as given.¹⁹³
2. The Seventh Circuit "distinguishes between an objection against punitive damages instructions being given at all, and an objection to the content of such a punitive damage instruction."¹⁹⁴
3. There is no doctrine of plain error protecting parties in civil cases from erroneous jury instructions to which no objection was made.¹⁹⁵
4. District courts cannot resolve disputed factual matters on the basis of affidavits without an evidentiary trial, even when the parties do not object; the error does not involve an evidentiary ruling, a jury instruction, or other preliminary matter that can be waived; rather, the error goes to the "heart of the truth-finding process,"¹⁹⁶ and courts have a basic obligation to try disputed issues of fact.¹⁹⁷

XV. SPECIFICITY REQUIRED IN DISTRICT COURT DECISIONS

There is an old adage among trial judges that the "less said the better." Although this has merit to the extent it recognizes that the trial courts are busy places where some speed in adjudication is necessary, it is now frowned upon by the Seventh Circuit.

For instance, in *DiLeo v. Ernst & Young*,¹⁹⁸ the Seventh Circuit took Judge Marovich of the Northern District of Illinois to task for failing to explain his dismissal of a securities fraud action. Writing for the panel, Judge Easterbrook explained the need for sufficiently thorough opinions:

The rationale behind the [trial court's] judgment is obscure. . . . Circuit Rule 50, which requires a judge to give reasons for dismissing a complaint, serves three functions: to create the mental discipline that an obligation to state reasons produces, to assure the parties that the court has considered the important arguments, and to enable a reviewing court to know the reasons for the judgment. A reference to another judge's opinion . . . ,

Article covering federal developments for the first time, the trial section of this year's Federal Practice Article will be brief.

193. *Coulter v. Vitale*, 882 F.2d 1286, 1289-90 (7th Cir. 1990).

194. *Id.* at 1289.

195. *Id.*

196. *Cole Energy Dev. Co. v. Ingersoll-Rand Co.*, 913 F.2d 1194, 1200 (7th Cir. 1990).

197. *Id.*

198. 901 F.2d 624 (7th Cir. 1990).

plus an unreasoned statement of legal conclusions, fulfils [sic] none of these.

The judge accepted the “reasons set forth in E&W’s briefs” in the district court. Even if we had copies of these briefs (no one supplied them to us), they would be inadequate. A district judge should not photocopy a lawyer’s brief and issue it as an opinion. Briefs are argumentative, partisan submissions. Judges should evaluate briefs and produce a neutral conclusion, not repeat an advocate’s oratory. From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises the judge’s reasons and portrays the court as an advocate’s tool, even when the judge adds some words of his own. Judicial adoption of an entire brief is worse. It withholds information about what arguments, in particular, the court found persuasive, and why it rejected contrary views. Unvarnished incorporation of a brief is a practice we hope to see no more.¹⁹⁹

Judge Easterbrook then added that “[f]ailure to state reasons for a decision ordinarily would lead to a remand.”²⁰⁰ However, the judgment below was affirmed because the plaintiff’s complaint was fatally inadequate. Thus, *DiLeo* shows that the district courts of this circuit are expected to explain their decisions. That Judge Easterbrook went to such lengths to make this point in an appeal that was patently without merit shows how seriously this is taken by the Seventh Circuit.

Similarly, in *Okaw Drainage District v. National Distillers and Chemical Corp.*,²⁰¹ another panel of the court criticized Judge Mills of the Central District of Illinois for failing to adequately explain his decision after a complex bench trial. Judge Mills had issued an oral opinion, which the Seventh Circuit noted is permissible under Rule 52(a).²⁰² Nonetheless, the Seventh Circuit wrote that “the goals of the rule cannot be attained unless the judge’s opinion, whether oral or written, indicates his resolution of conflicts in the evidence with clarity and specificity to enable the appellate judges to determine what the facts of the case are.”²⁰³

199. *Id.* at 626 (citations omitted).

200. *Id.*

201. 882 F.2d 1241 (7th Cir. 1989).

202. FED. R. CIV. P. 52(a) (requiring district judge to prepare findings of fact and conclusions of law in a civil bench trial).

203. *Okaw*, 882 F.2d at 1244. The Seventh Circuit added, “[W]hether rightly or wrongly, no federal judge, trial or appellate, has been given the broad discretion that medieval Lord Chancellors of England enjoyed to disregard the law in an effort to do more perfect substantive justice.” *Id.* at 1245.

To the same effect is *Horn v. Transcon Lines*,²⁰⁴ in which the Seventh Circuit remanded a case in which Judge Brooks had not sufficiently specified whom was to receive what relief in a purported judgment. Stressing the need for explanation by the district courts, the Seventh Circuit wrote:

When the district judge does not explain his decision, an appellate court should be skeptical Explanation produces intellectual discipline; a judge who sets down in writing (or articulates in court) the reasons pro and con, and his method of reaching a decision, must work through the factors before deciding, and we then may be sure that the conclusion is based on appropriate considerations even if not necessarily one we would have reached ourselves.²⁰⁵

These cases show that the Seventh Circuit will not blindly accept district court decisions under the rubric of appellate-court deference. The impact of these Seventh Circuit decisions on the district courts should be immediate and self-executing. When future decisions lack sufficient explanation, practitioners will be able to raise the deficiency. As a practical matter, the issue might be better raised on appeal than via a post-judgment motion, for the trial judge might be inclined to only clarify and reinforce the adverse decision already reached. Before the Seventh Circuit, though, a remand is possible, and under Circuit Rule 36 the case might be sent to a different judge.²⁰⁶

XVI. COSTS AND POST-JUDGMENT INTEREST

The courts addressed several issues pertaining to costs and post-judgment interest, which are summarized below:

1. Post-judgment interest is to be calculated from the date of the entry of judgment, not the date of the verdict, as the plain language of 28 U.S.C. § 1961 dictates.²⁰⁷
2. Expenses of obtaining a transcript of trial testimony and for copying court filings must be "necessary" to be recovered

204. 898 F.2d 589 (7th Cir. 1990).

205. *Id.* at 592 (citations omitted).

206. Circuit Rule 36 provides that when a case has been tried and then remanded for a new trial, the new trial shall be heard by a different judge unless the remand order directs otherwise or the parties request otherwise. Rule 36 also states that in "appeals which are not subject to this rule by its terms, this court may nevertheless direct in its opinion or order that this rule shall apply on remand." 7TH CIR. R. 36.

207. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 110 S. Ct. 1570, 1576 (1990) (resolving a split in the circuits).

as costs 28 U.S.C. § 1920.²⁰⁸

3. Only disbursements that were made in connection with the case at issue are taxable as costs; thus, expenses forming related suits are not recoverable.²⁰⁹

4. Charges for telephone calls, word-processing services, and attorneys' travel expenses incident to depositions are not taxable as costs.²¹⁰

5. Fees paid to a paralegal are indistinguishable from attorneys' fees and are thus not taxable as costs.²¹¹

6. Fees paid to an expert who was not appointed by the court are not recoverable.²¹²

7. Deposition expenses shown to be reasonably necessary to the case are recoverable as costs even if the deposition is not used at trial.²¹³

8. The plaintiff's filing fee is clearly recoverable as costs.²¹⁴

XVII. POST-JUDGMENT MOTIONS

A. Rule 59

Under Rule 59(b) and (e), motions to alter or amend a judgment or for a new trial must be served within ten days of the entry of judgment.²¹⁵ It is well settled that the time to make such a Rule 59

208. *McIlveen v. Stone Container Corp.*, 910 F.2d 1581, 1584 (7th Cir. 1990) (affirming district court's decision that such expenses were unnecessary). Section 1920 provides that the district court may tax:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920 (1990).

209. *Smith v. United States*, 735 F. Supp. 1396, 1403 (C.D. Ill. 1990).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 1404.

215. FED. R. CIV. P. 59. Under Rule 6, intermediate Saturdays, Sundays, and holidays are excluded from the ten days. (when the period of time allowed for some acts is less than 11 days). FED. R. CIV. P. 6.

motion cannot be enlarged; indeed, Rule 6(b) specifically states that district courts cannot extend the time for taking any action under Rule 59(b), (d), and (e).²¹⁶ Even when a party has failed to receive notice of a court order or judgment, the Seventh Circuit has confirmed that the district courts are without power to extend the time for filing a Rule 59 motion.²¹⁷

What, then, is the effect of a Rule 59 motion filed, for example, twenty-one days after the entry of judgment pursuant to the district judge's directions to counsel that they had twenty-one days to file such motions? In the 1967 case of *Eady v. Foerder*,²¹⁸ the Seventh Circuit held that when a judge extends the time for a new trial and counsel relies on the extension, the "unique circumstances" of the reliance allow the court to rule on the new trial motion.²¹⁹ During the survey period, the wisdom of the *Eady* doctrine was questioned by the entire Seventh Circuit in an *en banc* decision, and was upheld only because the judges were locked six to six on the viability of *Eady*.

Specifically, in *Varhol v. National Railroad Passenger Corp.*,²²⁰ six judges of the Seventh Circuit voted not to overrule the "unique circumstances" exception to Rule 59's ten-day time limit embraced in *Eady*. As the per curiam opinion states, "Since a majority of the court as constituted did not vote to overrule *Eady*, it remains as the law of this circuit."²²¹

The internal debate within the Seventh Circuit over the viability of *Eady* is certainly interesting from a scholarly standpoint, with one group treating the words of the Federal Rules as absolute,²²² and another adopting an approach that "avoids an overly rigid interpretation of the Rules and encourages courts to reach the merits of the dispute."²²³ The split in the Seventh Circuit over this narrow issue resembles the division in philosophy among the judges in general.

From a practical standpoint, attorneys should be advised that although *Eady* is still the law in the Seventh Circuit, the future of the

216. FED. R. CIV. P. 6(b); *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 262 n.5 (1978) (noting that Rule 6(b) prohibits enlargement of the time prescribed by Rule 59(e)); 4A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1167, at 495 (2d ed. 1987); PRACTITIONER'S HANDBOOK FOR APPEALS TO THE SEVENTH CIRCUIT 21 (1990).

217. *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 111 (7th Cir. 1985).

218. 381 F.2d 980 (7th Cir. 1967).

219. *Id.* at 981.

220. 909 F.2d 1557 (7th Cir. 1990) (*en banc*).

221. *Id.* at 1560. Chief Judge Bauer and Judges Wood, Cudahy, Flaum, Ripple, and Kanne voted not to overrule *Eady*. Judges Cummings, Posner, Coffey, Easterbrook, Manion, and Eschbach voted to overrule *Eady*.

222. *Id.* at 1572-77 (Manion, J., concurring in judgment).

223. *Id.* at 1570 (Flaum, J., concurring).

“unique circumstances” doctrine is in jeopardy in the Supreme Court. Indeed, in 1988 Justice Scalia, joined by Chief Justice Rehnquist and Justices O’Connor and Kennedy questioned its vitality.²²⁴ It is possible that the Supreme Court, as currently constituted, might someday hold that there are *no* exceptions to the ten-day limits of Rule 59, even when a district judge represents otherwise.

Thus, practitioners are advised to ensure that their Rule 59 motions are timely filed. No requests for additional time should be filed, and if a district judge purports to grant more time gratuitously,²²⁵ the ten-day limit should still be followed.

B. Rule 60

Rule 60 is the final hope for relief for those who have failed to file timely Rule 59 motions or perfect a timely appeal. Rule 60(a) allows clerical mistakes to be corrected at any time, while Rule 60(b) allows relief for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud . . . , misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged . . . ;
or
- (6) any other reason justifying relief from the operation of the judgment.²²⁶

Motions brought under Rule 60(b) must be made within a reasonable time, and those under subdivisions (1), (2), and (3) must be made within one year of the judgment or order at issue.²²⁷

The Seventh Circuit decided several Rule 60(b) cases during the survey period, which are summarized as follows:

1. In determining whether a motion for relief from judgment is brought to correct a clerical error under Rule 60(a), which can be brought at any time, or some other reason with a time

224. *Houston v. Lack*, 487 U.S. 266, 282 (1988) (Scalia, J., dissenting).

225. This would be an unlikely scenario, for as the court noted in *Varhol*, “That we have not had to invoke *Eady* between 1967 and today stands testament only to the apparent competence of the district courts in complying with Rule 6, and is not an implied criticism of *Eady*.” *Varhol*, 909 F.2d at 1572 n.3.

226. FED. R. CIV. P. 60(b).

227. *Id.*

limitation under Rule 60(b), the relevant distinction is between changes that implement the result intended by the court at the time of the order and changes that alter the original meaning to correct a legal or factual error; thus, if the flaw lies in the translation of the original meaning to the judgment, Rule 60(a) allows a correction; if the judgment captures the original meaning but is infected by error, the remedy is Rule 60(b).²²⁸

2. A Rule 60 motion challenging a dismissal for want of prosecution which was based upon the judge's lack of information falls under Rule 60(b)(1) and thus must be filed no later than one year after the order.²²⁹

3. Rule 60(b)(1)'s reference to "inadvertence or excusable neglect" does not authorize relief from the consequences of negligence or carelessness; there must be some justification for the error beyond a mere failure to exercise due care.²³⁰

4. So-called "county-seat lawyers" are held to the same standards as other lawyers; that is, the standard for excusable neglect under Rule 60(b)(1) is the same for all lawyers."²³¹

5. An attorney's gross negligence does not justify relief under Rule 60(b)(6), at least when the client was not diligent itself.²³²

6. Rule 60(b) relief is warranted when there is substantial danger that the underlying judgment is unjust.²³³

C. Remittitur

Remittitur is the procedural process by which a jury verdict is diminished. Although remittitur is usually raised at the district court, the Seventh Circuit used this procedure twice during the survey period.

In *Pincus v. Pabst Brewing Co.*,²³⁴ the Seventh Circuit found a damages award in a breach of contract case to be "monstrously excessive"

228. *Wesco Products Co. v. Alloy Automotive Co.*, 880 F.2d 981, 984 (7th Cir. 1989).

229. *Id.* at 985.

230. *Lomas and Nettleton Co. v. Wiseley*, 884 F.2d 965, 967 (7th Cir. 1989).

231. *Id.*

232. *Reinsurance Co. of Am. v. Administratia Asiguarilor de Stat*, 902 F.2d 1275, 1278 (7th Cir. 1990) (adding that "[w]e reserve for another day the question of whether a *diligent* client is entitled to relief under Rule 60(b) for the gross negligence of counsel").

233. *Del Carmen v. Emerson Elec. Co.*, 908 F.2d 158, 161 (7th Cir. 1990) (reversing district court's denial of a Rule 60(b) motion, holding that a dismissal for counsel's single failure to attend a status conference, without more, does not satisfy the threshold showing of delay, contumacious conduct, or failed prior sanctions to deny the plaintiff an opportunity to have his or her case decided on the merits).

234. 893 F.2d 1544 (7th Cir. 1990).

because the jury's award of nearly \$4 million left the plaintiff in a "dramatically better position than his rational expectation could have justified."²³⁵ The court ordered a new trial on damages unless the plaintiff was willing to accept a remittitur to \$525,000. Similarly, in *Cash v. Beltmann North American Co.*,²³⁶ the Seventh Circuit found a punitive damages award of \$134,767 to be excessive, and ordered a new trial on punitive damages unless the plaintiff was willing to accept a remittitur to \$75,000.

Both decisions are instructive for showing that appellate courts have the same power as trial courts to issue a remittitur.²³⁷ The *Cash* decision, however, is particularly noteworthy because the amount of punitive damages is ordinarily left undisturbed on appeal, and because the initial award was not that large. Practitioners challenging the size of jury verdicts, whether compensatory or punitive, should thus consider seeking remittitur at both the trial and appellate courts.

235. *Id.* at 1554-55.

236. 900 F.2d 109 (7th Cir. 1990).

237. *Pincus*, 893 F.2d at 1554; *Cash*, 900 F.2d at 112.

Recent Developments in Civil Rights

IVAN BODENSTEINER*

I. INTRODUCTION

One of the most significant developments in civil rights litigation is the expansion of immunity doctrines. Even though immunity is not mentioned in 42 U.S.C. § 1983,¹ the United States Supreme Court has given some governmental officials the benefit of a qualified immunity from damages,² and other officials an absolute immunity from damages.³ Further, the Court has opened the door to municipal liability, but it has limited this liability to situations in which municipal officials act pursuant to governmental policy or custom.⁴ Neither states, state agencies, nor state officials acting in their official capacity can be sued under section 1983 because they are not "persons."⁵ In addition, the eleventh amendment protects states from federal court judgments that would be satisfied from the state treasury.⁶ Although the immunity doctrines can be viewed simply as an attempt by the Court to allocate the loss in

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1. 42 U.S.C. § 1983 (1988) reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635 (1987) (qualified immunity is applicable to federal law enforcement officer who participates in a search that violates the fourth amendment); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (executive officials in general are usually entitled to only qualified immunity); *Wood v. Strickland*, 420 U.S. 308 (1975) (school officials entitled to qualified immunity from liability for damages under § 1983).

3. *See, e.g.*, *Briscoe v. LaHue*, 460 U.S. 325 (1983) (trial witnesses); *Stump v. Sparkman*, 435 U.S. 349 (1978) (judicial function); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutorial function); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislative function).

4. *Monell v. Department of Social Servs.*, 436 U.S. 658, 690-91 (1978).

5. *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2312 (1989).

6. *See, e.g.*, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) (an unconsenting state is immune from suits brought in federal courts by its citizens or citizens of another state); *Edelman v. Jordan*, 415 U.S. 651 (1974) (suits by private parties seeking to impose liability that must be paid from public funds in the state treasury are barred by the eleventh amendment).

civil rights cases, the doctrines all too frequently allow the wrongdoers to avoid the loss entirely.

In a related but different development, the Supreme Court has seriously restricted the liability of private employers engaging in racial discrimination. In *Patterson v. McLean Credit Union*,⁷ the Court limited the reach of 42 U.S.C. § 1981⁸ to race discrimination in the making and enforcement of contracts,⁹ thereby eliminating racial harassment claims and most likely discharge claims as well. This interpretation of section 1981 is important because of the limited remedies available under Title VII of the Civil Rights Act of 1964.¹⁰ Although section 1981 filled the gap in many race discrimination cases, the inadequacy of the remedies under Title VII often leaves the victims of sexual harassment without a remedy.¹¹ Congress attempted to fill the gap with the Civil Rights Act of 1990;¹² however, this was vetoed by President Bush in late October 1990.

II. IMMUNITIES

When government officials are sued for damages in their individual capacity under section 1983, they should consider raising qualified im-

7. 109 S. Ct. 2363 (1989).

8. 42 U.S.C. § 1981 (1988) reads as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

9. *Patterson*, 109 S. Ct. at 2372-73.

10. 42 U.S.C. §§ 2000e to 2000e-17 (1988). See, e.g., *King v. Board of Regents of Univ. of Wis. Sys.*, 898 F.2d 533, 537 (7th Cir. 1990) (compensatory, nominal, and punitive damages not available under Title VII).

11. See, e.g., *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464 (7th Cir. 1990) (sexual harassment by co-employee is not a violation of Title VII unless employer knew or should have known of harassment and failed to take immediate and appropriate corrective action); *Swanson v. Elmhurst Chrysler/Plymouth*, 882 F.2d 1235, 1239-40 (7th Cir. 1989) (relief under Title VII is limited to equitable relief; damages are not available), *cert denied*, 110 S. Ct. 758 (1990). Cf. *Bohen v. East Chicago, Ind.*, 799 F.2d 1180, 1184 (7th Cir. 1986) (although plaintiff was without a remedy under Title VII, she had a remedy under § 1983 because she was employed by a municipality).

12. The purpose of this Act, S. 2104, 101st Cong., 2d Sess. (1990), was "to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by these decisions," and "to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination." *Id.* § 2(b). Section 8 of the 1990 Act would have amended Title VII of the Civil Rights Act of 1964 by providing for compensatory and punitive damages, along with trial by jury.

munity as an affirmative defense.¹³ This defense is available when the substantive law that the plaintiff seeks to enforce through section 1983 was not "clearly established" at the time of the challenged conduct.¹⁴ In other words, the question is whether it was clear at the time of the officials' challenged conduct that they were violating the plaintiff's rights. If the law was not clearly established, the officials will not be held personally liable for damages even though the plaintiff prevails and is entitled to injunctive relief and damages from the officials' employer. If the law was clearly established, the officials generally can be held personally liable for damages.

Qualified immunity is actually more extensive than a protection from individual liability. When the immunity is available, the Supreme Court has held that government officials should not have to defend damage actions.¹⁵ Therefore, the Court has made every effort to reduce the qualified immunity issue to an objective, legal determination that can be resolved at an early stage in litigation through a motion for summary judgment.¹⁶ Furthermore, when the defendant official raises the defense in a motion for summary judgment¹⁷ and the motion is denied, the defendant is entitled to an immediate appeal under the collateral order

13. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). If the defense is not raised and pursued in a timely fashion, it will be considered waived. *See, e.g., Merritt v. Broglin*, 891 F.2d 169, 171-72 n.4 (7th Cir. 1989); *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989); *Walsh v. Mellas*, 837 F.2d 789, 799-800 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988). *Cf. Rakovich v. Wade*, 850 F.2d 1180, 1204 (7th Cir.) (immunity issue was properly preserved for appeal when defendant raised it in a motion for directed verdict at the close of plaintiff's case), *cert. denied*, 488 U.S. 968 (1988).

14. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Court in *Harlow* abandoned the subjective part of the test (that is, whether the official took the action with the malicious intention to cause a deprivation of rights) in order to facilitate the use of summary judgment. However, even when the law is clearly established, the official can still establish the defense if she can prove "extraordinary circumstances" as to why she neither knew nor should have known the relevant legal standard. *Id.* at 818-19. *See also Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

15. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). *See also Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) (qualified immunity "yields a right not to endure the cost and travail of trial").

16. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

17. Although the Court stressed the use of summary judgment to resolve the immunity issue at an early stage in the litigation, a defendant can raise the issue through a motion to dismiss. *See, e.g., Landstrom v. Illinois Dep't of Children & Family Servs.*, 892 F.2d 670, 675 n.8 (7th Cir. 1990). The disadvantages of this method are that the plaintiff's factual allegations in the complaint must be accepted as true and that the defendant does not have an opportunity to bring additional evidence to the attention of the court through discovery and affidavits.

doctrine.¹⁸ The rationale is that the right to be free from defending such a damage action can be fully protected only if the denial of summary judgment can be appealed immediately.

Although the Court's approach might sound quite reasonable in the abstract, it ignores the realities of litigation and unnecessarily tips the scale in favor of defendant officials. Some of the problems with the Court's approach are demonstrated by the following examples. In the first example, a section 1983 plaintiff alleges the use of excessive force by the police in making an arrest in violation of the fourth amendment to the United States Constitution.¹⁹ The defendants are the arresting officer and the municipality employing the officer. In addition to the section 1983 claim to enforce the fourth amendment, the plaintiff includes a pendent state tort claim.²⁰ Under section 1983, the plaintiff seeks compensatory and punitive damages from the officer in her individual capacity and compensatory damages from the municipality.²¹ Based upon the state tort claim, the complaint seeks compensatory and punitive damages from all defendants. Without getting into the conflict issues that arise when one attorney represents both defendants,²² the individual

18. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

19. *See, e.g., Keller v. Frink*, 745 F. Supp. 1428 (S.D. Ind. 1990).

20. The reference to a "pendent" state claim assumes the case was filed in federal court. Pendent jurisdiction is now codified as "supplemental" jurisdiction under 28 U.S.C. § 1367 (1991). Section 1983 actions can, of course, be brought in state court and, absent a "valid excuse," a state court cannot refuse to exercise jurisdiction over § 1983 actions. *Howlett v. Rose*, 110 S. Ct. 2430, 2438-42 (1990). When a § 1983 action is filed in state court, it is generally governed by federal law. *Felder v. Casey*, 487 U.S. 131, 151-53 (1988).

21. Punitive damages are generally not available against municipalities. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). However, if a state statute that indemnifies officials for individual liability does not exclude indemnity for punitive damages, this constitutes a waiver of the punitive damages protection for municipalities. *See, e.g., Kolar v. County of Sangamon of Ill.*, 756 F.2d 564, 567 (7th Cir. 1985); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1270-71 (7th Cir. 1984). Indiana law, IND. CODE § 34-4-16.7-1 (1988), allows state or local government to "pay any judgment, compromise, or settlement of [a] claim or suit" when a present or former public employee could be subjected to personal liability because of an "act or omission within the scope of his [or her] employment which violates the civil rights laws of the United States" if the governor, in the case of a claim against a state employee, or the governing body of a political subdivision, in the case of a claim against a local governmental entity, "determines that paying the judgment, compromise, or settlement is in the best interest of the governmental entity." This provision does *not* exclude indemnity for punitive damages. *Id.*

22. In *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990), where the same firm represented both the defendant county and its defendant employee, the court stated:

A serious potential for conflict exists in the differing interests of the county and its employee. While this circuit has rejected the almost absolute prohibition on dual representation of a municipality and its employees espoused in *Dunton*

officer can seek to avoid personal liability under section 1983 by raising the qualified immunity defense. The municipality can seek to avoid section 1983 liability by arguing that the officer was not acting pursuant to official policy or custom.²³ Liability on the state claim will, of course, depend upon state law, including compliance with the state notice of tort claim provision,²⁴ but respondeat superior is generally less of a problem. Regardless of technical liability, actual payment of a judgment will depend on whether state law provides for municipal indemnification of its officials²⁵ and/or whether the defendants are covered by liability insurance.

If the police officer is a member of the state police department, the issues are further complicated. Although the state police officer can be sued for damages in her individual capacity under section 1983, neither the state, the state police department, nor the officer in her official capacity is considered to be a "person" within the meaning of section 1983.²⁶ Thus, the only defendant in federal court would be the individual officer, who could raise the qualified immunity defense. The presence of the pendent state claim does not solve the problem because the federal court is still limited by the eleventh amendment and cannot award damages under state law which would have to be paid from the state treasury.²⁷ The plaintiff could, however, choose to bring the entire case in state court, thereby eliminating the eleventh amendment problem but not the section 1983 problems, including the definition of "person" and qualified immunity.

v. Suffolk County, 729 F.2d 903 (2d Cir. 1984), we have remained sensitive to the fact that such conflicts can arise. (citation omitted) It is not enough that the county would be liable for any compensatory damage award that Deputy Johnson would pay, (citation omitted); Johnson will still suffer the effect of any punitive damages not to mention the injury to his reputation as a law enforcement officer. The law firm representing Johnson and Lake County has made every effort to avoid this conflict, but some conflicts are unavoidable.

Id. at 1432.

23. *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 (1978).

24. See IND. CODE §§ 34-4-16.5-1 to -20 (1988). See also *Felder v. Casey*, 487 U.S. 131 (1988) (although § 1983 plaintiff filing in state court does not have to comply with such provisions, the Court's holding does not exempt compliance before bringing pendent state tort claims).

25. See IND. CODE §§ 34-4-16.7-1 to -4 (1988).

26. *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2312 (1989). See also *Rodenbeck v. Indiana*, 742 F. Supp. 1442, 1448 (N.D. Ind. 1990); *Colburn v. Trustees of Ind. Univ.*, 739 F. Supp. 1268, 1279-80 (S.D. Ind. 1990); *Parsons v. Bourff*, 739 F. Supp. 1266 (S.D. Ind. 1989); *Grosz v. Indiana*, 730 F. Supp. 1474, 1477-78 (S.D. Ind. 1990).

27. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 103-23 (1984) (eleventh amendment prohibits even injunctive relief based on a violation of state law).

In *Graham v. Connor*,²⁸ the Supreme Court made it clear that excessive force cases against law enforcement officials should be analyzed under the fourth amendment and its "reasonableness" standard, rather than under the substantive aspect of the due process clause in the fourteenth amendment.²⁹ When deciding whether the force used in a particular case is reasonable, courts require a balancing of the nature and the quality of the intrusion on fourth amendment interests against the governmental interest at stake.³⁰ Reasonableness must be judged on an objective basis from the perspective "of a reasonable officer on the scene," rather than from the 20/20 vision of hindsight.³¹ A fourth amendment "seizure" occurs when a person is "stopped by the very instrumentality set in motion or put in place in order to achieve that result."³² Thus, it has been stated that "a seizure is a [(1)] governmental [(2)] termination of freedom of movement [(3)] through means intentionally applied."³³ The Court also held that the use of deadly force is constitutional only if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."³⁴

Assume that the police officer in the first example sees two individuals drag a deer, which has been shot out of season, into a van and one of the individuals jumps into the rear of the van with the deer while the other runs to the side of the van as the van pulls away.³⁵ In an attempt to apprehend the two individuals, the officer fires a twelve-gauge shotgun slug through the rear of the van, striking the driver in the back. All three individuals are arrested and charged with illegal possession of game. The van driver sues the police officer as well as the officer's municipal employer, seeking damages under section 1983. In defense, the officer raises qualified immunity and files a motion for summary judgment contending that she believed the shotgun was loaded with buckshot instead of a slug and that she was only trying to "mark" the van for later identification when she fired the shotgun.

If the challenged conduct took place after the Supreme Court decisions in *Garner*, *Graham*, and *Brower*,³⁶ is the officer insulated from

28. 109 S. Ct. 1865 (1989).

29. *Id.* at 1871. See also *Chathas v. Smith*, 884 F.2d 980, 988-89 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1169 (1990).

30. *Graham*, 109 S. Ct. at 1871.

31. *Id.* at 1872.

32. *Brower v. Inyo County*, 489 U.S. 593, 599 (1989).

33. *Keller v. Frink*, 745 F. Supp. 1428, 1431 (S.D. Ind. 1990) (emphasis omitted).

34. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

35. See *Keller*, 745 F. Supp. at 1429.

36. See *supra* notes 34, 28, and 32.

a damage award by the qualified immunity defense? The plaintiff's fourth amendment right "must be sufficiently clear that a reasonable official would understand that what [she] is doing violates that right,"³⁷ and the plaintiff bears the initial burden of proving the existence of a clearly established right.³⁸ Although it is not necessary for the plaintiff to point to a case involving the exact fact situation, clearly established general principles under the fourth amendment will not suffice.³⁹ The plaintiff must show that "in the light of preexisting law the unlawfulness of the action is apparent."⁴⁰ In other words, the right allegedly violated must be defined with specificity, and the plaintiff must point to something other than a broad constitutional right that is clearly established.

The Supreme Court has clearly indicated its preference for resolving the qualified immunity issue on a motion for summary judgment, but it has not changed the standard for determining when summary judgment is appropriate.⁴¹ Thus, a motion for summary judgment raising the qualified immunity defense can be defeated by showing that there is a genuine dispute as to material facts. In this situation, the court can determine the status of the law at the time of the challenged conduct; however, the jury should resolve the factual disputes and determine whether the defendant's conduct was reasonable in light of the law.⁴²

The question raised by the motion for summary judgment is whether the police officer, when she fired a shotgun slug through the rear of

37. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

38. *Hannon v. Turnage*, 892 F.2d 653, 656 (7th Cir.), *cert. denied*, 111 S. Ct. 69 (1990); *Lenea v. Lane*, 882 F.2d 1171, 1177 (7th Cir. 1989); *Keller v. Frink*, 745 F. Supp. 1428, 1433 (S.D. Ind. 1990). *Cf. Williams v. Lane*, 851 F.2d 867, 882 (7th Cir. 1988) (defendant has burden of proof to establish qualified immunity as an affirmative defense), *cert. denied*, 488 U.S. 1070 (1989).

39. *See Anderson*, 483 U.S. at 640; *Auriemma v. Rice*, 910 F.2d 1449, 1455-56 (7th Cir. 1990); *Keller v. Frink*, 745 F. Supp. 1428, 1433 (S.D. Ind. 1990). *See also Jackson v. Mowery*, 743 F. Supp. 600, 604 (N.D. Ind. 1990) (even though the Supreme Court had established the right to marry as implicit in the Constitution, it did not apply this right in the prison context until *after* the requests made in this case; therefore, qualified immunity defense succeeds).

40. *Auriemma*, 910 F.2d at 1456. *See also Hedge v. County of Tippecanoe*, 890 F.2d 4, 6-8 (7th Cir. 1989); *Hartbarger v. Blackford County D.P.W.*, 733 F. Supp. 300, 302-03 (N.D. Ind. 1990).

41. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

42. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). Although the Seventh Circuit has held that the question of qualified immunity is for the judge to decide, *Hughes v. Meyer*, 880 F.2d 967, 969 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 2172 (1990), when there are unresolved factual issues, these issues should be decided by the jury through special interrogatories. *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir.), *cert. denied*, 111 S. Ct. 431 (1990).

the van striking the driver in the back, was violating the driver's clearly established fourth amendment rights. Remember, the fourth amendment standard is whether the officer's conduct was reasonable when judged "from the perspective of a reasonable officer on the scene."⁴³ Also, deadly force is constitutional only if the suspect poses a threat of serious physical harm.⁴⁴ These determinations can be made only after it is ascertained what happened at the scene. As with other factual issues, discovery should be permitted to give the parties every reasonable opportunity to develop the facts fully.⁴⁵ If the pleadings, affidavits, and discovery disclose that the officer's version of what happened at the scene differs from that of the plaintiff, and the plaintiff's version does not support the qualified immunity defense, then summary judgment is not appropriate.⁴⁶ Further, when the case goes to trial, the factual questions relevant to the qualified immunity issue should be submitted to the jury through special interrogatories.⁴⁷ The question of the reasonableness of the officer's conduct should also be determined by the jury.⁴⁸

When the motion for summary judgment on the qualified immunity issue is denied because the court finds the plaintiff's rights were clearly established, the order is immediately appealable under the collateral order

43. *Graham*, 109 S. Ct. at 1872.

44. *Garner*, 471 U.S. at 3.

45. In *Anderson*, the Court stated that "[o]ne of the purposes of the *Harlow* qualified immunity standard is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government.'" *Anderson*, 483 U.S. at 646-47 n.6 (citation omitted). However, the Court recognized that when a defendant is not entitled to the qualified immunity under the plaintiff's version of the facts, and the plaintiff's version differs from that of the defendant, then discovery "tailored specifically to the question of [the defendant's] qualified immunity" may be necessary. *Id.* See also *Green v. Carlson*, 826 F.2d 647, 652 (7th Cir. 1987); *Tucker v. Firks*, 731 F. Supp. 1355, 1359 (N.D. Ind. 1989) (when there are issues of disputed fact upon which the question of immunity turns, the case must proceed to trial). When plaintiffs anticipate a qualified immunity defense, they should be more specific in pleading the violation of a constitutional right, *Landstrom v. Illinois Dep't of Children & Family Serv.*, 892 F.2d 670, 675-76 (7th Cir. 1990), and "must include 'all the factual allegations necessary to sustain a conclusion that defendant violated clearly established law.'" *Sawyer v. County of Creek*, 908 F.2d 663, 667 (10th Cir. 1990) (citing *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988)); *Hannula v. City of Lakewood*, 907 F.2d 129, 131 (10th Cir. 1990).

46. *Mitchell*, 472 U.S. at 528. See also *Green v. Carlson*, 826 F.2d 647, 652 (7th Cir. 1987); *Tucker v. Firks*, 731 F. Supp. 1355, 1359 (N.D. Ind. 1989).

47. *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir.), *cert. denied*, 111 S. Ct. 431 (1990).

48. *Mitchell*, 472 U.S. at 528; *Keller v. Frink*, 745 F. Supp. at 1433 (S.D. Ind. 1990); *Tucker*, 731 F. Supp. at 1359.

doctrine.⁴⁹ This is true because the Court believes that the official's right to be free from defending the damage claim can be fully protected only if she can file an immediate appeal.⁵⁰ If an immediate appeal is not taken, the summary judgment ruling can be challenged with an appeal after the case is completed.⁵¹

The second example is a section 1983 action alleging a violation of the first amendment as a result of a political discharge of a municipal employee. The defendants, the mayor and the municipality, admit that the discharge was politically motivated, but contend it was not in violation of the first amendment because the plaintiff fits the policymaker exception.⁵² The issues are generally the same as in the first example when the defendant is a municipal police officer, but application of the qualified immunity doctrine is different because the plaintiff raises a first amendment claim instead of a fourth amendment claim.

When the mayor seeks summary judgment on the qualified immunity issue, the pleadings, affidavits, and discovery reveal a factual dispute as to the functions, duties, and responsibilities of the plaintiff. Therefore, the motion should be denied. In the alternative, there may be no facts in dispute, but the trial court could conclude that under clearly established law, the plaintiff was not a policymaker and therefore was protected by the first amendment. Here, the order denying summary judgment is immediately appealable.

It is not clear that the Supreme Court, in providing for an immediate appeal of a denial of summary judgment on the qualified immunity

49. *Mitchell*, 472 U.S. at 525-30; *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989). In the Seventh Circuit, this is true even when the complaint seeks injunctive relief as well as damages. *Scott v. Lacy*, 811 F.2d 1153 (7th Cir. 1987). *Cf. Prisco v. United States Dep't of Justice*, 851 F.2d 93, 96 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2428 (1989); *Kaiter v. Town of Boxford*, 836 F.2d 704, 706 (1st Cir. 1988). In *Hunafa v. Murphy*, 907 F.2d 46, 48-49 (7th Cir. 1990), the court held that when a substantial equitable claim will subject officers to suit, it is better to weigh it and develop a more complete record before attempting to decide whether defendants are subject to liability for damages. *Id.*

Some courts have held that when summary judgment is denied because of unresolved factual questions, the denial should not be viewed as a final appealable order. *See, e.g., White v. Frank*, 855 F.2d 956, 958 (2d Cir. 1988); *Marx v. Gumbinner*, 855 F.2d 783, 792 (11th Cir. 1988). There is support for this in *Mitchell* because the Court held the denial of a claim of qualified immunity is an appealable final decision "to the extent that it turns on an issue of law." 472 U.S. at 530.

50. *Mitchell*, 472 U.S. at 527-30; *Apostol*, 870 F.2d at 1338.

51. *Kurowski v. Krajewski*, 848 F.2d 767, 772-73 (7th Cir.), *cert. denied*, 488 U.S. 926 (1988).

52. This exception was recently addressed by the Seventh Circuit in *Hudson v. Burke*, 913 F.2d 427, 430-34 (7th Cir. 1990), and *Lohorn v. Michal*, 913 F.2d 327, 331-35 (7th Cir. 1990).

issue, fully considered the practical significance of its ruling. This can be demonstrated by the previous two examples. Keep in mind that the primary impetus for allowing an immediate appeal is the Court's desire to fully protect the defendant's right to avoid trial when the qualified immunity defense applies.⁵³ Thus, according to the Court, the immunity protects much more than the right to be free from damage liability.⁵⁴ In these examples, if an immediate appeal by the defendant official divests the trial court of jurisdiction,⁵⁵ the case is effectively put on hold until the appeal is completed. This is true despite the following factors: 1) In the first example, the individual officer will still have to defend a claim for damages based on state law, which claim arises out of the same factual situation as the section 1983 claim and, therefore, requires identical discovery and investigation; 2) in both examples, the municipality, which may be represented by the same attorney as the official or provide the official with separate representation, will have to defend the section 1983 claim for compensatory damages regardless of the outcome on the qualified immunity issue;⁵⁶ 3) in the second example, the mayor will remain in the case, in his official capacity, to defend the plaintiff's request for equitable relief, that is, reinstatement;⁵⁷ and 4) the municipalities, or their liability insurers, may be paying not only for the individual officials' defense but also any monetary judgment entered against the officials.⁵⁸

This suggests that the qualified immunity defense and the immediate appeal may give government officials more protection than is necessary, either because they have no real risk of personal liability or because they will have to defend a damage claim based on state law regardless of the outcome of the immunity issue under section 1983. This is unfortunate in light of the adverse consequences suffered by the plaintiffs

53. *Mitchell*, 472 U.S. at 527-30; *Apostol*, 870 F.2d at 1338.

54. *Mitchell*, 472 U.S. at 527-30; *Apostol*, 870 F.2d at 1338.

55. *Apostol*, 870 F.2d at 1338. "[A] proper *Forsyth* appeal divests the district court of jurisdiction (that is, authority) to require the appealing defendants to appear for trial." *Id.* The court also noted that "[a]s a rule, only one tribunal handles a case at a time." *Id.* at 1337. *Cf.* *Wilson v. O'Leary*, 895 F.2d 378, 382 (7th Cir. 1990) (when court of appeals hears an appeal from a "collateral order," the district court may proceed with the merits).

56. *See Owen v. City of Independence, Missouri*, 445 U.S. 622 (1980). *See also Hedge v. County of Tippecanoe*, 890 F.2d 4, 8-9 (7th Cir. 1989); *Pennington v. Hobson*, 719 F. Supp. 760, 773-74 (S.D. Ind. 1989).

57. *Lenea v. Lane*, 882 F.2d 1171, 1178-79 (7th Cir. 1989); *Conner v. Reinhard*, 847 F.2d 384, 387 (7th Cir.), *cert denied*, 488 U.S. 856 (1988); *Scott v. Lacy*, 811 F.2d 1153, 1154 (7th Cir. 1987); *Colburn v. Trustees of Ind. Univ.*, 739 F. Supp. 1268, 1299 (S.D. Ind. 1990).

58. *See IND. CODE §§ 34-4-16.7-1 to -4* (1988). *See also supra* note 22 regarding potential conflicts when the same law firm represents both the entity and the individuals.

and, in some cases, other defendants when an order denying the qualified immunity defense is immediately appealed. Unless the appeal is frivolous, it will usually lead to a stay of proceedings against the appealing official.⁵⁹ As a practical matter, district court proceedings will be stayed entirely because in most cases it would not make sense to have a state law damage claim and/or a section 1983 damage claim against the municipality proceeding on a different track than the damage claim against the individual official, particularly when all claims arise out of the same fact situation. This is true because there will be only one trial.⁶⁰ Other defendants, like the municipality, could be injured by the delay when a discharged plaintiff seeks reinstatement. A delay in the trial increases the amount of lost wages, plus prejudgment interest,⁶¹ recoverable by a prevailing plaintiff who has made reasonable efforts to mitigate, but without success.⁶² If after a prompt trial the plaintiff is reinstated, the municipality is paying for work, rather than back wages, for which it gets no services.

When the defendant entity in these two examples is changed to a state instead of a local municipality, the issues become even more complex. Based on the decision in *Will v. Michigan Department of State Police*,⁶³ neither a state, a state agency, nor a state official acting in an official capacity is a "person" within the meaning of section 1983 when a plaintiff seeks damages.⁶⁴ However, state officials still can be sued for injunctive relief under section 1983.⁶⁵ Thus, a plaintiff cannot avoid the restrictions of the eleventh amendment by bringing a section 1983 action against the state in state court. Further, the eleventh amendment prohibits federal courts from awarding monetary relief that would

59. *Apostol*, 870 F.2d at 1339.

60. The inefficiency of two trials when there is only one factual transaction is apparent. The increased burden on the judicial system, as well as the increased cost to the parties and inconvenience to witnesses will generally discourage more than one trial. Two trials arising out of the same factual transaction can lead to complex preclusion issues. See, e.g., *Lytle v. Household Mfg.*, 110 S. Ct. 1331 (1990); *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990).

61. Prejudgment interest is an ordinary part of any award for back pay. *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1297 (7th Cir. 1987); *Daniels v. Essex Group, Inc.*, 740 F. Supp. 553, 561-62 (N.D. Ind. 1990); *DeLaCruz v. Pruitt*, 590 F. Supp. 1296, 1308-09 (N.D. Ind. 1984).

62. The fact that a delay in the trial may lead to an increase in the amount of lost wages, which will generally be paid by the municipal entity, demonstrates the conflict when one law firm represents both the entity and the official claiming a qualified immunity. See *supra* note 22.

63. 109 S. Ct. 2304 (1989).

64. *Id.* at 2311-12.

65. *Id.* at 2311-12 n.10.

be paid from the state treasury.⁶⁶ Therefore, in our first case, the plaintiff could sue the police officer for damages in her individual capacity in federal court pursuant to section 1983, but would be faced with the qualified immunity issue. Further, the federal court could award damages against the individual officer based on the state claim, but not injunctive relief based on that claim.⁶⁷

In short, states, state agencies, and state officials acting in their official capacities cannot be sued for damages under section 1983 in any court; federal courts can award damages to section 1983 plaintiffs against state officials in their individual capacities; federal courts can award damages against state officials in their individual capacities based on state claims; federal courts can award prospective injunctive relief against state officials based on claims under section 1983, but not based on state law claims.

Municipalities can be sued under section 1983 for compensatory damages, but generally not punitive damages. Municipalities do not enjoy the qualified immunity enjoyed by government officials.⁶⁸ However, municipalities are not automatically liable because they employ a wrongdoer. Respondeat superior liability was explicitly rejected by the Supreme Court in *Monell v. Department of Social Services*,⁶⁹ in which the Court stated:

[I]t is when execution of government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.⁷⁰

This limitation on municipal liability has generated much litigation because its application requires a determination of whose conduct represents municipal "policy or custom." Here the Court has distinguished between those officials who are policymakers and those who are not.

Generally, policymakers are "those whose edicts or acts may fairly be said to represent official policy."⁷¹ For example, a prosecutor's instruction to law enforcement officers to forcibly enter a medical clinic, in violation of the fourth amendment, constitutes municipal "policy" when the prosecutor has the authority under state law to make this decision.⁷² However, a municipality is not automatically liable for all actions of one who is a policymaker because there must be evidence

66. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 103 (1984).

67. *Id.* at 100.

68. *See supra* note 56.

69. 436 U.S. 658 (1978).

70. *Id.* at 694.

71. *Id.*

72. *Pembaur v. Cincinnati*, 475 U.S. 469, 485 (1986).

that this person has final authority "to establish policy with respect to the action ordered."⁷³ Further, it is not clear that the municipality is liable when one of its policymakers acts contrary to municipal policy.⁷⁴

Following *Pembaur*, the Court further confused the issues in *St. Louis v. Praprotnik*⁷⁵ when it held that the city was not liable for a retaliatory employment decision made by a subordinate of a policymaker.⁷⁶ According to the four-Justice plurality decision, neither "[s]imply going along with discretionary decisions made by one's subordinates" nor "the mere failure to investigate the basis of a subordinate's discretionary decisions" constitutes a delegation of policymaking authority.⁷⁷ Three Justices concurred in the result in *Praprotnik* because the court below "identified only one unlawfully motivated municipal employee involved in [the challenged decision], and . . . that employee did not possess *final* policymaking authority with respect to the contested decision."⁷⁸ Because the official with the improper motive had only the authority to initiate transfers, subject to the approval of others, the concurring Justices agreed this official had no authority to establish city policy.⁷⁹ However, they did not agree with the reasoning of the plurality that the subordinate could not be a policymaker simply because his decisions were subject to review by others.⁸⁰

There was a more important source of disagreement between the concurring Justices and those joining the plurality opinion in *Praprotnik*. The plurality contended that the determination of whether an official has final policymaking authority is determined by the court based on state law.⁸¹ In contrast, the concurring Justices believed that it is a jury question.⁸² The position taken in the plurality opinion makes the issue appropriate for summary judgment and thus subject to resolution early in the litigation.

Although the decision in *Praprotnik* does little to clarify the law in this area, there are a few general rules that can be stated with some confidence. In the second example, if the mayor has final authority to

73. *Id.* at 481.

74. *See id.* at 486 (White, J., concurring). *See also* *Johnson v. Hardin County, Ky.*, 908 F.2d 1280, 1286-87 (6th Cir. 1990); *Redman v. County of San Diego*, 896 F.2d 362, 364 (9th Cir.), *reh'g granted*, 906 F.2d 1384 (9th Cir. 1990).

75. 485 U.S. 112 (1988).

76. *Id.* at 130.

77. *Id.*

78. *Id.* at 142 (Brennan, J., concurring) (emphasis added).

79. *Id.* at 137-42 (Brennan, J., concurring).

80. *Id.* at 146-47 (Brennan, J., concurring).

81. *Id.* at 124. *See also* *Crowder v. Sinyard*, 884 F.2d 804, 830 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 2617 (1990); *Wulf v. Wichita*, 883 F.2d 842, 868 (10th Cir. 1989).

82. *Praprotnik*, 485 U.S. at 143-44 (Brennan, J., concurring).

make employment decisions for the municipality, and made the decision to discharge the plaintiff, the entity will be liable so long as the decision was not contrary to express municipal policy.⁸³ On the other hand, even though the mayor may have final policymaking authority on some matters, if state or municipal law gives a board or commission responsibility for employment decisions, the municipality will not be liable for damages based on the mayor's decision to discharge.⁸⁴ In contrast, if the mayor has authority to discharge and made the decision to discharge the plaintiff, subject to review or approval by a board or commission, then municipal liability may turn on the nature of the review; the more circumscribed and deferential the review, the more likely the entity will be held liable.⁸⁵

In the case of nonpolicymakers, such as the officer involved in the first example, a municipality is liable if the challenged conduct was undertaken pursuant to express municipal policy or custom.⁸⁶ So, if the municipality had a policy authorizing the officer to fire a shotgun in the circumstances presented, the municipality could be held liable if it is determined that the plaintiff's fourth amendment rights were violated. However, absent an express policy or custom authorizing the challenged conduct, a section 1983 plaintiff must show a *de facto* policy or custom which caused the injury in order to hold the municipality liable.⁸⁷ Whether such a *de facto* policy or custom exists will turn on several factors, including the egregiousness of the challenged conduct, the nature and extent of the training provided to the wrongdoer, the frequency of similar misconduct, and the municipal response to such misconduct.⁸⁸

Although a jury should not be allowed to infer a "policy" of inadequate police training based on a single egregious incident,⁸⁹ inadequate training can lead to municipal liability when it is sufficiently inadequate to constitute "deliberate indifference to the rights of persons with whom the police come into contact."⁹⁰ If the police officer in the first example received no training on apprehending suspects and on using deadly force, the municipality may be held liable. However, the plaintiff

83. See *supra* notes 72-82 and accompanying text.

84. See *supra* notes 77 and 78.

85. *Praprotnik*, 485 U.S. at 145-47 (Brennan, J., concurring).

86. *Monell v. Department of Social Servs.*, 436 U.S. 655, 690-91 (1978).

87. See, e.g., *Vukadinovich v. McCarthy*, 901 F.2d 1439, 1443-44 (7th Cir. 1990) (inadequate training or a deficiency in investigating a complaint may represent "city policy" if it reflects a deliberate indifference to the rights of the victim and the plaintiff can show that the inadequacy or deficiency caused the constitutional deprivation). See also *Sims v. Mulcahy*, 902 F.2d 524, 541-45 (7th Cir.), *cert. denied*, 111 S. Ct. 249 (1990).

88. *Sims*, 902 F.2d at 541-44.

89. *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985).

90. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989).

must also show that the deficiency in training was the "moving force" or cause of the violation of the plaintiff's rights.⁹¹ The "deliberate indifference" standard, adopted for inadequate training cases, will probably govern cases in which the plaintiff seeks to establish a de facto policy or custom based on inadequate supervision or lack of official response to other misconduct of the nonpolicymakers.⁹²

Thus, it becomes quite apparent that the section 1983 plaintiffs in the two examples might establish a violation of their constitutional rights, but would be left without a damage remedy under section 1983. If the police officer in the first case is able to establish a qualified immunity from damages and the plaintiff cannot show a municipal policy or custom that caused the injury, damages will not be awarded under section 1983. Similarly, in the second case, even if the court concludes that the plaintiff was not a policymaker and, therefore, her first amendment rights were violated, the individual official will be immune from damages unless it was "clearly established" that the plaintiff was not a policymaker. Further, the city might escape liability if the mayor had no authority to make the challenged decision or if the city had a policy against politically motivated discharges of nonpolicymakers. Again a prevailing section 1983 plaintiff is left without a damage remedy. This seems directly contrary to the purpose of section 1983.

Municipal liability becomes even more critical when section 1983 plaintiffs sue officials who enjoy an absolute immunity from damages. Judges and prosecutors have long enjoyed an absolute immunity from damages when performing judicial or prosecutorial acts.⁹³ However, not all acts of judges are judicial,⁹⁴ and one need not have the title of judge in order to take advantage of the absolute immunity.⁹⁵ If the challenged conduct was within the court's jurisdiction and involved a function normally performed by a judge, the absolute immunity from damages

91. *Harris*, 489 U.S. at 391. See also *Sims*, 902 F.2d at 542; *Vukadinovich*, 901 F.2d at 1444; *Patrick v. Jasper County*, 901 F.2d 561, 565 (7th Cir. 1990); *Pennington v. Hobson*, 719 F. Supp. 760, 773 (S.D. Ind. 1989).

92. See, e.g., *Vukadinovich*, 901 F.2d at 1443 (failure to investigate).

93. See, e.g., *Stump v. Sparkman*, 435 U.S. 349 (1978) (judicial acts); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutorial acts).

94. See, e.g., *Forrester v. White*, 484 U.S. 219, 228 (1988) (personnel decisions made by a state court judge are administrative rather than judicial acts).

95. See, e.g., *Butz v. Economou*, 438 U.S. 478, 514 (1978) (absolute judicial immunity extended to administrative law judges performing adjudicatory functions). Cf. *Cleavinger v. Saxner*, 474 U.S. 193, 204-06 (1986) (absolute immunity does not extend to members of a prison disciplinary committee, primarily because of the absence of procedural safeguards and the fact that members of the committee are subordinates of the warden rather than independent decisionmakers).

applies.⁹⁶ For example, an Indiana trial judge and court of appeals judge who allegedly conspired to interfere with an appeal of a criminal conviction by requiring both defendants in a consolidated trial to purchase the transcript are immune from damages.⁹⁷ Similarly, an Indiana trial judge who allegedly falsified a transcript was found to be immune from damages.⁹⁸ In these cases, quasi-judicial immunity protected members of the court staff who followed orders given by the judges.⁹⁹

Even if one accepts the policy reasons for absolute judicial immunity — that is, the need for independent judicial determinations without the constant fear of personal damage actions under section 1983 in situations where errors can be corrected through appeals¹⁰⁰ — there does not seem to be any justification for extending the immunity to judges who falsify transcripts or seek to make it more difficult for those convicted in criminal cases to perfect an appeal. Of course, the judges should not be held liable if the plaintiff cannot prove the allegations, but this concerns the merits of the case rather than the immunity issue. Judges do not enjoy an absolute immunity from injunctive relief and can be held liable for attorney fees under 42 U.S.C. § 1988¹⁰¹ when a plaintiff prevails in seeking an injunction.¹⁰²

When judges or those acting like judges are able to establish an absolute immunity, the question of municipal liability again becomes important. However, it is often difficult to determine the judge's "employer." For example, is a circuit, superior, or county court judge in Indiana an employee of the county or the state?¹⁰³ Regardless of who employs state judges, can a city or county be held liable for damages when its police department follows a "policy" set by one of these judges?¹⁰⁴ Assume that a police department follows a bond schedule for

96. See, e.g., *Stump*, 435 U.S. at 356, 359-60; *Dellenbach v. Letsinger*, 889 F.2d 755, 759 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1821 (1990).

97. *Dellenbach*, 889 F.2d at 760-62.

98. *Scruggs v. Moellering*, 870 F.2d 376, 377 (7th Cir.), *cert. denied*, 110 S. Ct. 371 (1989).

99. *Dellenbach*, 889 F.2d at 762-63; *Scruggs*, 870 F.2d at 377.

100. See *Forrester v. White*, 484 U.S. 219, 225 (1988); *Stump v. Sparkman*, 435 U.S. 349, 363-64 (1978).

101. This section was amended in 1976 to provide attorney fees to the prevailing party in cases brought under various civil rights provisions, including § 1983. See 42 U.S.C. § 1988 (1988).

102. *Pulliam v. Allen*, 466 U.S. 522, 542 (1984).

103. In *Pruitt v. Kimbrough*, 536 F. Supp. 764, 766 (N.D. Ind. 1982), the court concluded that the judges are not local county officials. See also *Parsons v. Bourff*, 739 F. Supp. 1266, 1267 (S.D. Ind. 1989) (clerk of circuit court for Howard County is a state official). Cf. *Williams v. Butler*, 863 F.2d 1398, 1402-03 (8th Cir. 1988) (conduct of municipal judge leads to municipal liability), *cert. denied*, 109 S. Ct. 3215 (1989).

104. See *Woods v. Michigan City, Ind.*, 685 F. Supp. 1457, 1461-64 (N.D. Ind.

traffic offenders which was promulgated by a superior court.¹⁰⁵ The judge is not a city employee, but has the authority to set the amount of bail for individuals charged with a criminal offense in the superior court.¹⁰⁶ Because the judge enjoys absolute immunity from damages and because the arresting officer may enjoy a qualified immunity,¹⁰⁷ is the plaintiff who is illegally incarcerated for several days without a damage remedy? If the judge is not the city's policymaker, the city should still be liable if its police department voluntarily accepted the bond schedule. If the city had no choice but to follow the schedule, state law seems to have made the judge its policymaker, and liability should follow.¹⁰⁸

A question concerning the extent of prosecutorial immunity is raised when a prosecutor advises the police. For example, in *Burns v. Reed*,¹⁰⁹ the Delaware county prosecutor was "afforded absolute immunity for giving legal advice to police officers about the legality of their prospective investigative conduct."¹¹⁰ Judge Ripple, in a concurring opinion, stressed that the immunity would not extend to a situation in which "the prosecutor goes beyond rendering legal advice and assumes responsibility for the management of the investigation."¹¹¹ Given the purpose of an absolute immunity for prosecutors — that is, to avoid having prosecutors approach their law enforcement duties fearful of their potential liability¹¹² — why should a prosecutor who gives advice to police officers be treated differently than the police officers themselves?¹¹³ Although the conduct of police in a criminal investigation is certainly relevant to the ultimate prosecution, there is no reason to extend absolute immunity when the prosecutor would be sufficiently protected by a qualified immunity. Unless the prosecutor's advice contravened clearly established law, the prosecutor, like the police, would be protected by a qualified immunity. Isn't that enough?

In summary, it is clear that section 1983 plaintiffs must do more than establish liability, that is, a violation of the United States Con-

1988). See also *Anela v. City of Wildwood*, 790 F.2d 1063, 1065-67 (3d Cir.), cert. denied, 479 U.S. 949 (1986).

105. See, e.g., *Woods*, 685 F. Supp. at 1459.

106. *Woods*, 685 F. Supp. at 1463.

107. See *supra* notes 2 and 3. See also, *Woods*, 685 F. Supp. at 1464-65 (police officers entitled to qualified immunity).

108. See *supra* note 72.

109. 894 F.2d 949 (7th Cir.), cert. granted, 110 S. Ct. 3269 (1990).

110. *Id.* at 956. Cf. *Petry v. Lawler*, 718 F. Supp. 1396, 1401 (S.D. Ind. 1989) (prosecutor engaged in police-like investigation entitled to no more than qualified immunity).

111. *Burns*, 894 F.2d at 957 (Ripple, J., concurring).

112. *Imbler v. Pachtman*, 424 U.S. 409, 424-25 (1976). See also *Burns*, 894 F.2d at 953.

113. The investigative conduct of police officers is protected by the qualified immunity defense. See *Petry*, 718 F. Supp. at 1401.

stitution or federal statutes, when seeking damages. The Court has provided individual officials with substantial protection without making municipalities liable whenever the officials enjoy this protection. Therefore, section 1983 plaintiffs whose rights were violated may be without a damage remedy.

III. RACIAL AND SEXUAL HARASSMENT IN THE WORKPLACE

The primary source of relief for victims of race or gender discrimination in private employment is Title VII of the Civil Rights Act of 1964.¹¹⁴ Plaintiffs can bring such actions in either state or federal court,¹¹⁵ but because Title VII provides only for equitable relief, there is no right to a jury trial.¹¹⁶ Although equitable relief can include lost wages and benefits, it clearly does not include compensatory and punitive damages.¹¹⁷ Therefore, victims of race or gender discrimination frequently look to another source of substantive rights. Except for federal employees,¹¹⁸ Title VII is not the exclusive source of relief for employment discrimination.¹¹⁹ In the past, plaintiffs alleging race discrimination often included a claim under 42 U.S.C. § 1981,¹²⁰ which makes available compensatory and punitive damages. Victims of gender discrimination in private employment, particularly sexual harassment, have included pendent state tort claims.¹²¹ State or local government employees claiming gender

114. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

115. *Yellow Freight Sys. v. Donnelly*, 110 S. Ct. 1566, 1570 (1990).

116. Although the Supreme Court has not ruled on the availability of a jury trial in Title VII litigation, *Lytle v. Household Mfg.*, 110 S. Ct. 1331, 1335 n.1 (1990), the lower courts are nearly unanimous in holding that there is no right to trial by jury. *See, e.g., Brooms v. Regal Tube Co.*, 881 F.2d 412, 423 (7th Cir. 1989).

117. *See, e.g., King v. Board of Regents of Univ. of Wis. Sys.*, 898 F.2d 533, 537 (7th Cir. 1990).

118. The Court has held that § 717 of Title VII, 42 U.S.C. § 2000e-16, provides the exclusive remedy for employment discrimination claims against the United States. *Brown v. General Servs. Admin.*, 425 U.S. 820, 829 (1976).

119. *See, e.g., Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1974) (remedies available under Title VII and 42 U.S.C. § 1981 are "separate, distinct, and independent"). *See also Lytle v. Household Mfg.*, 110 S. Ct. 1331, 1335-37 (1990) (judge's findings of fact on Title VII issue cannot be used to preclude a jury determination on § 1981 claims because it would interfere with the seventh amendment right to trial by jury).

120. *See supra* note 8.

121. *See, e.g., Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465-66 (7th Cir. 1990); *Spencer v. General Elec. Co.*, 894 F.2d 651, 655-58 (4th Cir. 1990); *Zabkowicz v. West Bend Co.*, 789 F.2d 540, 545-48 (7th Cir. 1986); *Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497, 1503-04 (11th Cir. 1985); *Phillips v. Smalley Maintenance Serv., Inc.*, 711 F.2d 1524, 1531 (11th Cir. 1983); *Frykberg v. State Farm Mut. Auto Ins. Co.*, 557 F. Supp. 517 (W.D.N.C. 1983); *Guyette v. Stauffer Chemical Co.*, 518 F. Supp. 521, 523-25 (D.N.J. 1981). *See supra* text accompanying note 20.

discrimination frequently include a claim under section 1983, alleging a violation of the equal protection clause.¹²² Recent decisions seriously restrict the use of section 1981 to remedy race discrimination and the use of state tort theories in challenging sexual harassment.

One of the Supreme Court decisions that would have been overturned by the Civil Rights Act of 1990 is *Patterson v. McLean Credit Union*.¹²³ In *Patterson*, the Court held that because section 1981 refers only to race discrimination in the making and enforcement of contracts, it generally does not reach discriminatory conduct that arises after formation of the employment contract.¹²⁴ Therefore, racial harassment and discharge claims are not actionable, while the denial of a promotion can be challenged only when the promotion "rises to the level of an opportunity for a new and distinct relation between the employee and the employer."¹²⁵ Retaliation, motivated by race, may still be actionable under section 1981.¹²⁶ The Seventh Circuit has held that *Patterson* should be given retroactive application unless plaintiffs can show that they detrimentally relied on the pre*Patterson* interpretation of section 1981.¹²⁷

After *Patterson*, it is still clear that section 1981 can be used to challenge the initial hiring decision as racially discriminatory. Unless a plaintiff can show that a willingness to endure racial harassment was part of the original employment agreement, *Patterson* precludes the use of section 1981 to challenge racial harassment in the workplace.¹²⁸ A refusal to promote, when the promotion would have resulted in "a new and distinct relation between the employee and the employer," is actionable under section 1981.¹²⁹ However, it is not clear what constitutes a "new and distinct relation." A denial of a pay raise would not qualify

122. See, e.g., *King v. Board of Regents of Univ. of Wis. Sys.*, 898 F.2d 533, 537 (7th Cir. 1990); *Andrews v. Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 581 (2d Cir. 1989); *Bohen v. East Chicago, Ind.*, 799 F.2d 1180, 1185 (7th Cir. 1986). Cf. *Gray v. Lacke*, 885 F.2d 399, 414 (7th Cir. 1989) (allegations of retaliation against the plaintiff because of her complaints of sexual harassment do not state a claim under the equal protection clause), *cert. denied*, 110 S. Ct. 1476 (1990).

123. 109 S. Ct. 2363 (1989).

124. *Id.* at 2372-73.

125. *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1311 (7th Cir. 1989). See also *Bailey v. Northern Ind. Pub. Serv. Co.*, 910 F.2d 406, 409-11 (7th Cir. 1990).

126. *McKnight v. General Motors Corp.*, 908 F.2d 104, 111-12 (7th Cir. 1990) (retaliation that impairs an employee's ability to enforce established contract rights through legal process is actionable under § 1981, but not retaliation for complaints filed under anti-discrimination laws). See also *Malhotra*, 885 F.2d at 1313.

127. *McKnight*, 908 F.2d at 110-11.

128. *Patterson*, 109 S. Ct. at 2363. See also *Malhotra*, 885 F.2d at 1312.

129. *Bailey*, 910 F.2d at 410; *McKnight*, 908 F.2d at 109-10; *Malhotra*, 885 F.2d at 1311.

as a "new and distinct relation," whereas a denial of an opportunity to move from a bargaining unit position to a supervisory or management position should qualify. However, there are many situations in between that are less than clear. Relevant considerations should include whether there was a change in duties, whether there was a change in authority and responsibility, whether applications were accepted from both inside and outside the company, and whether the sought-after position is considered a stepping stone to higher level positions.¹³⁰ Even though *Patterson* did not involve a discharge, most courts have excluded discharge cases unless the plaintiff can show that a discriminatory discharge was, in effect, a term or condition of the original employment agreement.¹³¹

A claim of retaliation for filing anti-discrimination complaints may still be actionable under section 1981 because it punishes "efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private entities, such as labor unions, and enforcing the terms of a contract."¹³² However, "[t]he right to enforce contracts does not . . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights."¹³³ Therefore, section 1981 does not extend to retaliation resulting from efforts to enforce rights under anti-discrimination laws.¹³⁴ Rights conferred by anti-discrimination laws are not contractual rights, and the Seventh Circuit in *McKnight* refused to read such a contractual duty into every employment contract.¹³⁵

After *Patterson*, plaintiffs seeking to include claims under section 1981 should be careful in formulating their complaint. Section 1981 claims that would survive *Patterson* if properly pleaded might be dismissed or adversely decided on a summary judgment motion if the plaintiff does not plead in anticipation of a *Patterson* defense. For example, in promotion cases it is important to allege the denial of an opportunity

130. *Bailey*, 910 F.2d at 410; *McKnight*, 908 F.2d at 109-10; *Malhotra*, 885 F.2d at 1311.

131. *Bailey*, 910 F.2d at 409; *McKnight*, 908 F.2d at 108-09; *Sims v. Mulcahy*, 902 F.2d 524, 537 (7th Cir.), *cert. denied*, 111 S. Ct. 249 (1990). *Contra Hicks v. Brown Group, Inc.*, 902 F.2d 630, 638-39 (8th Cir. 1990) (*Patterson* did not resolve the question of whether discharge claims are actionable under § 1981 and because protection from racially motivated deprivation of contracts is essential to the full enjoyment of the right to make contracts, discriminatory discharge is still cognizable under § 1981; this is supported by the legislative history of § 1981 as well as previous Supreme Court decisions). See also *Taggart v. Jefferson County Child Support Unit*, 915 F.2d 396 (8th Cir. 1990).

132. *Patterson*, 109 S. Ct. at 2373.

133. *Id.*

134. *McKnight*, 908 F.2d at 112.

135. *Id.*

for a new and distinct employment relation; if the employer's post-formation discrimination was implicit in the original hiring, it should be pleaded as such. Because section 1981 claims for damages trigger a right to jury trial, the relevant factual questions concerning issues such as the denial of a promotion should be determined by the jury.

Unless racial harassment in the workplace results in a constructive discharge,¹³⁶ such cases usually do not result in any lost wages. Therefore any monetary award under Title VII is precluded, and the *Patterson* limitations on section 1981 become devastating. The Court's suggestion to the contrary, referring to the availability of Title VII,¹³⁷ simply ignores the significance of damages in harassment cases. Racial harassment cases are analogous to sexual harassment claims under Title VII¹³⁸ when the plaintiff has not been discharged but has suffered substantial emotional and mental distress as a result of the harassment.¹³⁹ Sexual harassment plaintiffs frequently have looked to state tort law, but this has been seriously limited by the decision in *Fields v. Cummins Employees Federal Credit Union*¹⁴⁰ which held that such tort claims are within the exclusive jurisdiction of Indiana's worker's compensation law.¹⁴¹ Although compensation may be available under the worker's compensation statute, it is generally considered less favorable than the damages available under tort law.

These deficiencies in Title VII would have been remedied by the Civil Rights Act of 1990 if it had not been vetoed by President Bush. By providing for compensatory and punitive damages,¹⁴² the Act generally would have eliminated the need for Title VII plaintiffs to look for other provisions with better remedies. In the meantime, serious gaps remain in the relief available to the victims of race and gender discrimination in private employment.

IV. CONCLUSION

A clear trend in the Supreme Court is to limit the availability of damages in civil rights actions. Section 1983 plaintiffs can be left without

136. See, e.g., *Daniels v. Essex Group, Inc.*, 740 F. Supp. 553, 560-61 (N.D. Ind. 1990).

137. *Patterson*, 109 S. Ct. at 2374-75.

138. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-68 (1986), the Court made it clear that the Title VII prohibition against sex discrimination includes sexual harassment.

139. Victims of racial harassment who are employed by state or local government can raise an equal protection claim under § 1983, like victims of sexual harassment. See *supra* note 122.

140. 540 N.E.2d 631 (Ind. Ct. App. 1989). See also *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465-66 (7th Cir. 1990).

141. *Fields*, 540 N.E.2d at 636.

142. See S. 2104, 101st Cong., 2d Sess. § 8 (1990).

a damage remedy because the Court has taken an "activist" approach in greatly expanding the immunity doctrines beyond the face of the statute. State and local governments and government officials have been given protection, at the expense of the victims of civil rights deprivations, far beyond what is necessary for the proper functioning of these governmental units and officials. Similarly, the Supreme Court has deprived many victims of race discrimination in private employment of their most effective remedy, section 1981. This was accomplished by a very narrow reading of the language of the statute, after two decades of numerous lower courts interpreting section 1981 as prohibiting a broad range of discriminatory practices in private employment. At this point, it appears that only congressional action will reverse this trend in the Supreme Court.

Constitutional Law: Nude Dancing and Political Speech As Protected Expression — the Scope of the Due Process Guarantee

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I. INTRODUCTION

In a 1988 address, Chief Justice Shepard invited Indiana practitioners to reexamine the Indiana Constitution as a potentially significant source for the protection of individual liberty.¹ Although there has been some movement in this direction in defending the rights of criminals,² there has been little civil rights litigation brought under the Indiana Constitution.³ Therefore, this Article will explore state and federal court cases that raise significant federal constitutional issues implicating Indiana law and Indiana litigants. The most noteworthy cases during the survey period dealt with freedom of expression and the due process clause.

II. FREEDOM OF EXPRESSION

A. Regulation of Adult Entertainment

The United States Supreme Court began its 1990-91 term by agreeing to decide the constitutional validity of Indiana's public indecency statute⁴

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1. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

2. See, e.g., Kammen and Polito, *Survey of Recent Developments in Indiana Criminal Law and Procedure*, 23 IND. L. REV. 303, 308 (1990) (discussing cases that focus on the state constitutional right to confront accusers face-to-face).

3. A notable exception was the Indiana Supreme Court's interpretation of the Indiana constitutional prohibition on takings to require compensation for work performed by former mental patients. See *R.D. Orr v. Sonnenburg*, 542 N.E.2d 201 (Ind. 1989). In September 1991, trial is set to determine whether Indiana's educational funding formula is contrary to the equal protection and education clauses of the state constitution. *Lake Central School Corp. v. State of Indiana*, No. 56C01-8704-CP-81 (Newton Cir. Ct.).

4. IND. CODE § 35-45-4-1(a)(3) (1988) makes public indecency, including appearing nude in public, a crime. Nudity is defined in the statute as
the showing of the human male or female genitals, pubic area, or buttocks with less than opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered

as applied to non-obscene nude dancing. In *Miller v. Civil City of South Bend*,⁵ suit was brought by J.R.'s Kitty Kat Lounge, a drinking establishment in South Bend which provided nude dancing as entertainment for its patrons, and by the Glen Theatre, an establishment that does not serve alcoholic beverages but similarly provides nude dancing. In addition, these businesses were joined by three dancers who engaged in this activity.⁶ The Seventh Circuit, in a 7-4 en banc ruling, held that (1) non-obscene nude dancing performed as entertainment is expression and thus entitled to first amendment protection;⁷ and (2) that Indiana's public indecency statute, which provides for a total ban on nudity in public places, is unconstitutional as applied to prohibit such dancing.⁸ Each of these two holdings requires a separate analysis.

In *Miller*, Judge Flaum found grounds for constitutionally protecting nude dancing based on: the lengthy history of dance as a form of expressive entertainment dating back to classical Greece and ancient Rome;⁹ Supreme Court precedent suggesting that nude dancing "is not without First Amendment protection;"¹⁰ and the opinions of two other circuit courts of appeal that similarly have afforded protection to nude dancing.¹¹

male genitals in a discernibly turgid state.

Id. at (b).

The Indiana Supreme Court, in *State v. Baysinger*, 397 N.E.2d 580 (Ind. 1979), *appeal dismissed for want of a substantial federal question sub nom.* *Clark v. Indiana*, 446 U.S. 931 (1980), interpreted the statute to apply to nude entertainment in theaters, nightclubs, and other establishments open to the public, although it carved out an exception for performances having an expressive character. In *Adims v. State*, 461 N.E.2d 740 (Ind. Ct. App. 1984), the court ruled that the indecency law may be constitutionally applied to peepshows in bookstores when there was "no hint of expressive content," and in *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984), it sustained the application of the law to nude dancing performed in an enclosed theater.

5. 904 F.2d 1081 (7th Cir.), *cert. granted sub nom.* *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 38 (1990).

6. *Id.* at 1082.

7. *Id.* at 1085.

8. *Id.* at 1089.

9. *Id.* at 1085-86.

10. *Id.* at 1083-84. The court cited three Supreme Court decisions which in dicta suggested that nude dancing enjoys some first amendment protection: *Schad v. Mount Ephraim*, 452 U.S. 61, 66 (1981) ("[N]ude dancing is not without its First Amendment protections from official regulation."); *Doran v. Salem Inn*, 422 U.S. 922, 932 (1975) ("Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized [in *LaRue*] that this form of entertainment might be entitled to First and Fourteenth Amendment protection in some circumstances."); *California v. LaRue*, 409 U.S. 109, 118 (1972) ("[S]ome of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression.").

11. The Ninth and Eleventh Circuits, relying on *Schad*, have assumed that nude

In a lengthy concurrence, Judge Posner stressed the difficulty of drawing lines between expression and non-expression, art and entertainment, speech and conduct, ideas and emotion,¹² and upper-class and lower-class “non-obscene erotica.”¹³ Judge Posner noted the absence of “objective standards of aesthetic quality” and his concern that judges not assume the role of “art critic and censor.”¹⁴ Judges Flaum and Posner both argued that the dancers were conveying a message — one of eroticism and sensuality.¹⁵

After finding expressive value in nude dancing, the majority conceded that Indiana’s interest in protecting public morality may justify the regulation of nude dancing, including reasonable time, manner, and place restrictions as well as regulation under the power granted to the state by the twenty-first amendment to control establishments that serve liquor.¹⁶ The Supreme Court actually has sustained the validity of California’s ban on “grossly sexual exhibitions” in bars based on the twenty-first amendment.¹⁷ However, because Indiana’s public indecency statute on its face provides for a total ban of all forms of nudity in all public places, it is unconstitutional.¹⁸ Judge Posner stressed that a local ordinance forbidding nude dancing in bars would be constitutionally unproblematic, but that “a statewide ban on such dancing, applicable to theaters as well as to bars, violates the First Amendment.”¹⁹ Thus, the Seventh Circuit was required to address the difficult issue of whether non-obscene nude dancing performed as entertainment is expression entitled to any first amendment protection.²⁰

dancing is constitutionally protected expression. See *BSA, Inc. v. King County*, 804 F.2d 1104, 1107 (9th Cir. 1986); *International Food & Beverage Sys. v. Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986).

12. *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1100 (7th Cir.), *cert. granted sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 38 (1990) (Posner, J., concurring).

13. *Id.* at 1098. Judge Flaum expressed the same view: “Any attempt to distinguish ‘high’ art from ‘low’ entertainment based solely on the advancement of *intellectual ideas* must necessarily fail.” *Id.* at 1086. See also *Cohen v. California*, 403 U.S. 15, 25 (1971) (“[W]e think it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual”).

14. *Miller*, 904 F.2d at 1086.

15. *Id.* at 1087-88, 1092 (Posner, J., concurring).

16. *Id.* at 1088-89.

17. *California v. LaRue*, 409 U.S. 1109 (1972). In this case, however, evidence was presented that the nude dancing had encouraged prostitution and other lewd conduct. See also *Newport v. Iacobucci*, 479 U.S. 92 (1986) (ordinance prohibiting nude dancing in establishments licensed to sell liquor is permitted under the 21st amendment); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 717 (1981) (*per curiam*) (“The State’s power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs.”).

18. *Miller*, 904 F.2d at 1088.

19. *Id.* at 1102.

20. *Id.* at 1082.

The dissenters argued that nude dancing lacks any communicative element, and that even if an inherent message could be found, it is outweighed by society's interest in protecting morality.²¹ Dissenting, Judge Easterbrook stressed that a person desiring to engage in expressive conduct has the burden of demonstrating "that the First Amendment even applies."²² The district court in this case made explicit findings, based on the testimony of the dancers, that they were not trying to express any ideas.²³ Judge Easterbrook further argued that the lack of serious artistic value provides assurance that Indiana will not use its statute to forbid "important aspects of culture."²⁴ He found Supreme Court precedent allegedly establishing the protected status of nude dancing much less clear than asserted by the majority.²⁵ Easterbrook also emphasized that the Indiana statute proscribed nudity, not dancing, and that the reasons for the law had nothing to do with the purported communicative character of the conduct.²⁶

In his dissenting opinion, Judge Coffey focused on the state's significant interest in protecting public morality, as well as the right of the people of Indiana "to implement their beliefs and conceptions of proper moral principles through their legislature."²⁷ He relied heavily on the final report of the Attorney General's Commission on Pornography which included findings on the harm caused by exhibitions, like nude dancing, that degrade women²⁸ — a harm that Judge Coffey found clearly outweighed any expressive value in this so-called "speech."²⁹ He charged the majority with engaging in unwarranted judicial activism in extending the first amendment to protect nude dancing, contrary to the intent of the framers.³⁰ Finally, Judge Coffey noted the contrary holding of the

21. Judges Coffey, Easterbrook, and Manion authored separate dissenting opinions, and Judge Kanne joined in Judge Easterbrook's dissenting opinion. *Id.* at 1104-35.

22. *Id.* at 1123.

23. *Id.* at 1124-25 (Easterbrook, J., dissenting). Judge Easterbrook noted, "Neither the dancers nor their lawyers came up with a message in five years of litigation." *Id.* at 1129.

24. *Id.* at 1126.

25. *Id.* at 1127-28 (*Schad* was based on an overbreadth challenge, and its author, Justice White, later noted that the status of nude dancing remained unsettled).

26. *Id.* at 1120-22.

27. *Id.* at 1109. Judge Easterbrook, *id.* at 1129-30, and Judge Manion, *id.* at 1132-33, emphasized the same concern for federalism.

28. *Id.* at 1110-13.

29. Like Judge Easterbrook, Judge Coffey stressed that the plaintiffs "have clearly stated that they have no intention of conveying or expressing any political or ideological message." Thus, he found it difficult to see how any expression was being impeded through the state regulation. *Id.* at 1119.

30. *Id.* at 1105-06.

Sixth Circuit,³¹ which found that nude dancing is plainly “not a fundamental right entitled to heightened scrutiny.”³² Following the Seventh Circuit decision, the Eighth Circuit joined in the foray, attacking the majority opinion in *Miller* as stretching the first amendment “beyond the pale.”³³ The court found that since the primary message communicated by barroom dancers is one of “prurience,” the communication is simply not entitled to first amendment protection.³⁴

In resolving the apparent conflict regarding nude dancing, the United States Supreme Court must first decide whether this form of entertainment is expressive activity. Dealing with this issue in recent flag burning cases, the Supreme Court stated the question as whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”³⁵ Compliance with this standard is problematic in light of the district court’s factual findings that the dancers’ conduct was not intended to be “expressive activity.”³⁶ Although the Supreme Court has been reluctant to deny the communicative value of an individual’s expressive conduct,³⁷ the record in this case is particularly troublesome because the district court relied on the dancers’ own testimony that their purpose was not to express ideas, but rather to encourage patrons to buy drinks.³⁸ The

31. *Id.* at 1116.

32. *Id.* (citing *Wal-Juice Bar, Inc. v. Elliot*, 899 F.2d 1502, 1507 (6th Cir. 1990)).

33. *Walker v. City of Kansas City, Mo.*, 911 F.2d 80, 86 (8th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3503, 3566 (U.S. Jan. 4, 1991) (No. 90-1075).

34. *Id.* at 88. Note that this opinion was not joined by either of the other two panelists; one concurred solely on grounds of the 21st amendment, and the other dissented relying specifically on *Schad* as controlling precedent.

35. *Texas v. Johnson*, 109 S. Ct. 2533, 2539 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

36. *Miller*, 904 F.2d at 1116.

37. *See, e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (Court assumes, without deciding, that overnight sleeping in a public park in connection with a demonstration to call attention to the plight of the homeless “is expressive conduct protected to some extent by the First Amendment.”); *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (Court assumes, without deciding, that O’Brien’s conduct in burning his draft card has a communicative element “sufficient to bring into play the First Amendment.”).

Cf. *City of Dallas v. Stanglin*, 109 S. Ct. 1591, 1595 (1989) (“[I]t is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”); *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (rejecting the view that “an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea”). *See also* *Young v. New York City Transit Auth.*, 903 F.2d 146, 154 (2d Cir. 1990) (because most individuals who beg do not intend to convey a particularized message, transit authority may constitutionally prohibit begging and panhandling in the subway system).

38. *Miller*, 904 F.2d at 1116. At oral argument, counsel in fact stated that there

Supreme Court may find that no message was being conveyed, or that, at best, the case involves a purely commercial message that is entitled to less protection than noncommercial speech.³⁹ On the other hand, it could find, as a majority of the court of appeals did, that nude dancing "inherently embodies the expression and communication of ideas and emotions," thus entitling it to full protection under the first amendment.⁴⁰

If the Supreme Court finds that nude dancing carries an "inherent message," whether ideological or purely emotive, it is still possible for it to sustain Indiana's regulation. Normally when the Court finds that government is trying to forbid speech because of its message or its communicative impact, it has applied a strict scrutiny standard, requiring the government to justify its regulation by a compelling reason and by means that are no more restrictive than necessary.⁴¹ As the Supreme Court reaffirmed in the recent flag desecration cases, a "bedrock principle underlying the First Amendment" is that expression of an idea cannot be prohibited simply because society finds the idea offensive or disagreeable.⁴² Nonetheless, the Court could sustain the application of Indiana's indecency law to nude dancing under one of two approaches. First, as suggested earlier, it could determine that although expression is implicated, such expression should not be entitled to the full protection afforded other forms of speech. Although the theory that courts may assess the value of different kinds of speech has not been adopted by a majority of the Court, at least outside the context of purely commercial speech, some Justices have suggested that sexually explicit material and those who engage in pandering such material should not be afforded full first amendment protection.⁴³ Adopting this approach, the Court could

was no contention that an idea was being communicated. Indeed, two dancers testified that the purpose of their dance was to get customers to like them and buy them drinks, because their salary depended on the number of drinks purchased. *Id.* at 1123. *See also* Cowgill v. California, 396 U.S. 371 (1970) (sustaining appellant's conviction for flag desecration due to the lack of any recognizable communicative aspect to his conduct in wearing a flag sewn into a vest).

39. *See supra* note 37. *Cf.* Posadas De Puerto Rico Ass'n v. Tourism Co., 478 U.S. 328 (1986) (sustaining a Puerto Rican statute prohibiting commercial advertising of gambling parlors in order to protect the health, safety, and morality of its citizens).

40. *Miller*, 904 F.2d at 1085.

41. *Texas v. Johnson*, 109 S. Ct. 2533, 2544 (1989).

42. *Id.* *See also* Ward v. Rock Against Racism, 109 S. Ct. 2746, 2754 (1989) (the primary inquiry "is whether government has adopted a regulation of speech because of disagreement with the message it conveys").

43. *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 622 (1990) (Scalia, J., dissenting) (establishments that exhibit public nudity are engaged in the business of pandering and the Constitution should not foreclose a state or city from prohibiting businesses that "intentionally specializ[e] in . . . live human nudity"); *FCC v. Pacifica Foundation*, 438 U.S.

find that the harmful consequences of this activity simply outweigh any marginal expressive value.⁴⁴

In order to avoid the controversial problem of assessing the "value" of different types of speech, the Supreme Court could characterize the regulation as unrelated to the suppression of ideas. Some Justices, as well as other legal authorities, have argued that in light of the ambiguity of ascertaining intent underlying human conduct, it is better to focus on the state's purpose in suppressing the given conduct to determine whether allegedly communicative activity should be protected.⁴⁵ The question is whether government is punishing the conduct because government perceives the message and dislikes what it is being communicated; if so, strict scrutiny must be applied.⁴⁶ On the other hand, the Supreme Court held in *United States v. O'Brien*⁴⁷ that regulation of conduct that contains a communicative aspect is permitted when the regulation furthers an important government interest unrelated to the suppression of free expression. Although this analysis also requires that the regulation be narrowly tailored to serve the state's interest, arguably nothing less than

726, 743 (1978) (plurality opinion of Justice Stevens) (although FCC regulation prescribing the broadcast of "indecent" material is overbroad because the provision will affect only references to excretory and sexual activities, *i.e.* references that lie at the periphery of the first amendment, the regulation should be sustained; the overbreadth doctrine should not be used to "preserve the vigor of patently offensive sexual and excretory speech"); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion of Justice Stevens) ("... even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate").

Cf. *FCC v. Pacifica Foundation*, 438 U.S. 726, 761 (1978) (Powell, J., concurring) ("I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection."). Justice Brennan similarly noted "the Court's refusal to create a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content." *Id.* at 763 (Brennan, J., dissenting).

44. *Miller*, 904 F.2d at 1111 (Coffey, J., dissenting); *id.* at 1131 (Manion, J., dissenting).

45. See L. NIMMER, *FREEDOM OF SPEECH* § 3.06 (1984); TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2 (2d Ed. 1988). See also *Texas v. Johnson*, 109 S. Ct. 2533, 2540 (1989) ("It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.").

46. *Johnson*, 109 S. Ct. at 2540; *Boos v. Barry*, 485 U.S. 312, 321 (1988).

47. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms").

a flat ban will meet the government's concern with public nudity.⁴⁸ Judge Easterbrook in dissent argued that Indiana's reasons for prohibiting public nudity have nothing to do with the expression of an opinion or viewpoint.⁴⁹ Adopting an analysis propounded by then-Judge Scalia, Judge Easterbrook argued that whenever a neutral law allegedly affects "expression" rather than "speech," the law should be sustained, provided the purpose of the proscription on conduct is not to suppress communication.⁵⁰ Further, he argued that even under the more restrictive traditional *O'Brien* analysis, the law should be upheld "as a neutral regulation of conduct."⁵¹

Relying on related Supreme Court doctrine,⁵² Judge Coffey argued that the statute could be sustained as a valid "time, manner, place restriction" on speech.⁵³ Although the first requirement under this analysis is that the regulation be content-neutral, this obstacle may be overcome. The Supreme Court has sustained a zoning restriction aimed only at adult establishments by reasoning that the city's intent was not to suppress sexually explicit material, but rather was only to control the secondary effects caused by these businesses.⁵⁴ Similarly, Judge Coffey argued here

48. See *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (only a flat ban on posting signs on public property will address the city's concern with visual clutter and blight; where the medium of expression itself causes the harm, the law curtails no more speech than is necessary to accomplish its purpose). Judge Coffey finds this case validates a flat ban on public nudity. *Miller*, 904 F.2d at 1119 (Coffey, J., dissenting). See also *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2757-58 (1989) (although regulation of protected speech must be narrowly tailored, "it need not be the least-restrictive or least-intrusive means of doing so;" it suffices that the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation"); *Frisby v. Schultz*, 108 S. Ct. 2495, 2502-2503 (1988) ("A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.").

49. *Miller*, 904 F.2d at 1121-22 (Easterbrook, J., dissenting). Taking a contrary position, Judge Flaum argued that Indiana's purpose in promoting public morality cannot be separated from its desire to preserve a particular set of views. Thus, the statute restricts activity "precisely because it expresses a particular message contrary to the legislature's prescribed vision." *Id.* at 1088 n.7.

50. *Id.* at 1121-22 ("a law proscribing conduct for a reason having nothing to do with its communicative character need only meet the ordinary minimal requirements of the equal protection clause").

51. *Id.* at 1123.

52. The Supreme Court has noted that the *O'Brien* standard for validating regulation of expressive conduct and the time, place, or manner analysis are essentially the same. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984). See also *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2757 (1989) (the time, manner, place standard "in the last analysis is little, if any, different from the standard applied" in the *O'Brien* test).

53. *Miller*, 904 F.2d at 1115-16.

54. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49 (1986). See also

that Indiana's concern is not with the communicative effect of nude dancing, but only with its "secondary effects," namely prostitution, spread of AIDS, and deterioration of the neighborhood.⁵⁵ In short, by focusing on the purportedly content neutral reasons for imposing a ban on public nudity, the Supreme Court may sustain the regulation by finding that these reasons simply outweigh whatever limited first amendment rights are implicated.⁵⁶

Even if the Supreme Court sustains the Seventh Circuit holding that Indiana's public indecency statute may not be applied to non-obscene nude dancing, Indiana is certainly not prevented from dealing with this alleged problem. As Judge Posner noted, the twenty-first amendment to the United States Constitution provides the trump card because it enables the states to pass regulations regarding distribution of alcohol, and thus permits Indiana to ban nude dancing in bars.⁵⁷ Indeed, Judge Posner stated that if Indiana is seriously concerned with the consequences of nude barroom dancing, "it will amend its public-indecency statute to prohibit nude dancing in establishments that serve liquor."⁵⁸

As to the problem posed by nude dancing in non-liquor-serving establishments like the Glen Theatre, enact so-called reasonable time, manner, and, Indiana may place restrictions, such as zoning ordinances. The Supreme Court has sustained similar regulation of adult businesses even when the practical effect has been to deny any commercially viable locations for such establishments.⁵⁹ When coupled with the state's right

Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("the principle inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys").

55. *Miller*, 904 F.2d at 1113. Note, however, that Indiana does not record legislative history. *Id.* at 1088. Further, the majority criticizes the State for the limited analysis in its brief that provides "no explanation of the evil at which the statute is aimed." *Id.* at 1100. The state presented no evidence establishing a link to prostitution or adultery. *Id.* at 1100-01. Judge Posner notes the problem of making this a state-wide ordinance, whereas evidence that prostitution was a local problem might justify a municipal ordinance. *Id.* at 1102.

56. *Id.* at 1135 (Manion, J., dissenting).

57. *Id.* at 1102.

58. *Id.* at 1104. Judge Posner noted that the amendment would be valid under the 21st amendment and would "moot the questions that divide this court." *Id.* He further recognized that Indiana is rather "exceptional" in imposing a ban on erotic dancing without recourse to the 21st amendment. *Id.* at 1090. See also *supra* note 17 and cases cited therein.

59. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1986) (even if the zoning restriction had the effect of significantly restricting commercially viable sites for adult theatres, "respondents must fend for themselves in the real estate market," because the first amendment does not ensure "sites at bargain prices"). See also 11126 *Baltimore Blvd. v. Prince George's County, Md.*, 886 F.2d 1415, 1420 (4th Cir. 1989), *vacated and remanded*, 110 S. Ct. 2580 (1990) (sustaining the validity of a county's adult bookstore

to close down adult business establishments relying on facially neutral criminal statutes⁶⁰ or pursuant to Indiana's civil RICO law,⁶¹ the practical implications of any Supreme Court holding in *Miller* are, in reality, negligible. On the other hand, the case raises highly sensitive constitutional questions regarding the proper role of the judiciary in assessing the expressive value of conduct, the significance of original intent in interpreting the constitution, and the proper balance of state and federal power⁶² — questions that clearly transcend the interests of the dancers at the Kitty Kat Lounge or Glen Theatre.

zoning regulations that do not regulate speech-related activities on the basis of content, but rather restrict "primarily noncommunicative aspects of Plaintiff's right to own and operate a bookstore."); *Thames Enterprises, Inc. v. City of St. Louis*, 851 F.2d 199 (8th Cir. 1988) (zoning regulation prohibiting location of adult establishment within 500 feet of residential area is sustained even though there were no detailed evidentiary findings as to the deleterious effects such establishments have on surrounding neighborhoods; personal observations and judgments of legislators coupled with research of other sources is sufficient under *Renton*); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988) (choice of 750 feet is an appropriate distance in zoning restriction on adult establishments; the ordinance leaves open ample alternative avenues of communication, especially in light of the *Renton* holding that alternative sites need not be commercially viable); *International Food & Beverage Sys. v. Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986) (constitutional protection of nude dancing is subject to reasonable time, place, and manner restrictions, such as the zoning ordinance in question that prohibited nude bars from operating within 750 feet of residentially zoned land or churches, schools, public parks, etc.); *BSA, Inc. v. King County*, 804 F.2d 1104, 1109-11 (9th Cir. 1986) (zoning, operating hour limits, and licensing fees may all be applied to deal with the additional problems posed by topless dancing clubs; further, regulation requiring all nude entertainment be performed on a stage 18 inches high and six feet from the nearest patron is valid).

Cf. Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102 (9th Cir. 1988) (ordinance's 1,000-foot separation requirement between adult businesses that would have the practical effect of closing the only existing adult theater with no definite prospect of a place to relocate violates the first amendment).

60. *See, e.g., Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (city's closure of adult establishment as a public nuisance does not implicate or trigger first amendment protections). *See also O'Connor v. City and County of Denver*, 894 F.2d 1210, 1217 (10th Cir. 1990) (revocation of adult theater's license because of a significant number of acts of public indecency does not implicate first amendment protections); *Chulchian v. City of Indianapolis*, 633 F.2d 27, 31 (7th Cir. 1980) (the fact that a commercial enterprise deals in material protected by the first amendment does not immunize it from police power regulations).

61. *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989) (upholding stiff RICO penalties against those who commit multiple violations of obscenity laws and who are accordingly defined to be "racketeers"). *See also Studio Art Theater v. State*, 530 N.E.2d 750 (Ind. Ct. App. 1988), *cert. denied*, 110 S. Ct. 1523 (1990) (sustaining conviction under state RICO Act for violation of obscenity statutes prohibiting sale of sexually explicit material harmful to minors within 500 feet of the nearest property line of a school or church).

62. *See, e.g., Miller*, 904 F.2d at 1105-07 (Coffey, J., dissenting); *id.* at 1129-31 (Easterbrook, J., dissenting); *id.* at 1132-33 (Manion, J., dissenting).

B. Political Patronage

Questions regarding the authority of government employers to make decisions based on political affiliation continue to plague state and federal courts. In the 1976 landmark case of *Elrod v. Burns*,⁶³ the Supreme Court held that the dismissal of public employees for reasons of political patronage violates the first amendment unless a "policymaking" exception is met.⁶⁴ The Court subsequently explained that the critical question in deciding whether a particular job is insulated from patronage practices is not whether the position can be labeled "policy-making," but rather "whether the hiring authority can demonstrate that political affiliation is an appropriate requirement for the effective performance of the public office involved."⁶⁵ Applying this standard in *McDermott v. Bicanic*,⁶⁶ the Indiana Court of Appeals held that *Elrod* did not protect the city's administrator of parks and recreation because the position involved organization and coordination of park and recreation programs, budget preparation, contract negotiation, and a critical role in hiring decisions.⁶⁷

A more controversial patronage question was posed in *Inner City Leasing & Trucking Co. v. City of Gary*.⁶⁸ In this case, the Indiana district court refused to extend *Elrod* to an independent contractor working for the city.⁶⁹ The plaintiff alleged that the city terminated his contract due to the proprietor's staunch support of former Mayor Richard Hatcher.⁷⁰ The court granted the city's motion to dismiss the complaint, finding no basis for a first amendment claim even if the plaintiff was terminated for political reasons.⁷¹ The court's holding was dictated by *Triad Associates, Inc. v. Chicago Housing Authority*,⁷² in which the Seventh Circuit reaffirmed its position that the first amendment does not protect an

63. 427 U.S. 347 (1976).

64. *Id.* at 367-72.

65. *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

66. 550 N.E.2d 93 (Ind. Ct. App. 1990).

67. The Seventh Circuit previously had reached the same conclusion in *Bicanic v. McDermott*, 867 F.2d 391, 393-94 (7th Cir. 1989). *Cf.* *Meeks v. Grimes*, 779 F.2d 417, 423 (7th Cir. 1985) (only those employees who work in direct and constant contact with a political official would be exempt from first amendment protection against patronage dismissals); *Grossart v. Dinaso*, 758 F.2d 1221, 1227 (7th Cir. 1985) (compilation of data according to generally accepted accounting principles and the need to base financial decisions on such data does not create the type of position as to which there is room for principled disagreement on goals or their implementation, and thus the individual is not a policymaker).

68. No. H89-169 (unpublished) (N.D. Ind. July 11, 1990).

69. *Id.*

70. *Id.* at 3.

71. *Id.* at 5.

72. 892 F.2d 583 (7th Cir. 1989).

independent contractor from termination of a public contract for partisan political reasons.⁷³

Other circuits have also refused to recognize first amendment claims on behalf of independent contractors either for denial of new contracts or removal from existing contracts or contractor positions.⁷⁴ Although conceding that the respective interests identified by the Supreme Court in *Elrod* and *Branti* are basically the same interests implicated when patronage practices affect independent contractors, nonetheless, the lower courts have ruled that the balance should be struck differently. These courts have emphasized that public officials should be permitted to employ independent contractors based on political party affiliation in order to implement their programs.⁷⁵ Further, they argue that the coerciveness associated with public employees carries diminished weight when an independent contractor, as opposed to a government employee, is involved.⁷⁶ More basically, these lower courts have expressed a reluctance to expand the principle of *Elrod*, deciding instead to leave any extension to the Supreme Court: "Some day the Supreme Court may extend the principle of its public-employee cases to contractors. But there are enough differences in the strength of the competing interests in the two classes of cases to persuade us not to attempt to do so."⁷⁷

73. The court in *Triad* relied on its earlier holding in *LaFalce v. Houston*, 712 F.2d 292, 294 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984).

74. See *Horn v. Kean*, 796 F.2d 668, 673-75 (3d Cir. 1986) (permitting those who hold public office to employ independent contractors based on political party affiliation provides an effective method to implement the administration's program that outweighs the lesser burden posed when it is a contractor and not a state employee whose rights are at stake); *Sweeney v. Bond*, 669 F.2d 542, 545 (8th Cir. 1982), *cert. denied*, 459 U.S. 878 (1982) (politically motivated dismissal of Missouri Department of Revenue fee agents, whom the court found to be independent contractors, does not violate the first amendment); *Fox & Co. v. Schoemehl*, 671 F.2d 303, 305 (8th Cir. 1982) (politically motivated dismissal of a public accounting firm from its position as city auditor does not contravene the first amendment because the firm is merely an independent contractor). Cf. *Lundblad v. Celeste*, 874 F.2d 1097, 1102 (6th Cir.), *vacated*, 882 F.2d 207 (1989) (because it was not clearly established that refusal of public employees to grant a public contract to the lowest bidder solely because of a political affiliation violated first amendment rights, the defendants are entitled to qualified immunity from civil damages under §1983).

75. See *Horn*, 796 F.2d 668; *Triad*, 892 F.2d at 587 (the cost of further subjecting this country's long-established patronage system to first amendment scrutiny outweighs the benefits to a contractor's exercise of first amendment rights).

76. See, e.g., *Horn*, 796 F.2d at 674-75 (independent contractor normally would feel a lesser sense of dependency, and thus first amendment interests are more attenuated and insufficient to justify tampering with political institutions).

77. *LaFalce*, 712 F.2d at 295. See also *Horn*, 796 F.2d at 677 ("[A]s the force of a First Amendment assault on state patronage practices moves from public employment into the outer spheres of political life, we are extremely hesitant to realign radically, in the name of the Constitution, a political constellation that has been with us since the

Although the Supreme Court has not yet addressed the applicability of *Elrod* to independent contractors,⁷⁸ its recent decision in *Rutan v. Republican Party of Illinois*⁷⁹ suggests that the lower courts may be required to reevaluate the issue. In *Rutan*, the Supreme Court extended first amendment protection to employment decisions regarding hiring, promotion, transfer, and recall after layoff.⁸⁰ It reversed the Seventh Circuit's holding that unless the employment decisions challenged were "the substantial equivalent of a dismissal," first amendment rights were insufficiently implicated.⁸¹ In rejecting this analysis, the Supreme Court stated that "we find this test unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless pressed state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy."⁸² The Court held that denial of a transfer or a promotion based on partisan political reasons constituted a significant penalty imposed for exercise of rights guaranteed by the first amendment.⁸³ Further, the Court failed to understand how "preservation of the democratic process" was served by such patronage actions any more than by patronage dismissals.⁸⁴

The Supreme Court in *Rutan* also addressed the subject of politically based hiring decisions. It held that conditioning hiring decisions on political belief and association imposed "an unconstitutional condition," and it failed to find a vital interest to support such decision-making.⁸⁵ Government's asserted interests in securing loyal employees and in preserving the democratic party and the two-party system were insufficiently vital, or could be served without relying on patronage practices.⁸⁶ In reaching its conclusion, the Court relied on precedent which found generally that government may not condition valuable benefits on relinquishing constitutional rights.⁸⁷

republic was formed.'). The Seventh Circuit in *Triad* similarly left this extension to the Supreme Court. 892 F.2d at 588.

78. See *Branti v. Finkel*, 445 U.S. 507, 513 n.7 (1980) (specifically noting that it was not addressing the question of "granting political supporters lucrative government contracts"); *Elrod v. Burns*, 427 U.S. 347, 353 (1976) ("Although political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reasons.').

79. 110 S. Ct. 2729 (1990).

80. *Id.* at 2737.

81. *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 954-57 (7th Cir. 1989), *modified*, 110 S. Ct. 2729 (1990).

82. *Rutan*, 110 S. Ct. at 2737.

83. *Id.*

84. *Id.* ("A government's interest in securing effective employees can be met by discharging, demoting or transferring staff members whose work is deficient.').

85. *Id.* at 2739.

86. *Id.*

87. *Id.* at 2736.

The logic of *Rutan* would appear to control the question of government contracts. Patronage contracting is coercive in the same manner that patronage employment is coercive. The Supreme Court already has recognized this rationale in a related context. In *Lefkowitz v. Turley*,⁸⁸ it invalidated a state statute requiring public contractors to waive their fifth amendment immunity from self-incrimination in any proceeding related to their government contract or face a five-year ban on doing further business with the government. The Court specifically rejected the argument that there was "a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor."⁸⁹ The same reasoning should govern first amendment claims.⁹⁰

The Seventh Circuit's position on independent contractors relies heavily on the argument that loss of one contract is not so significantly penalizing that it triggers the protection of *Elrod*.⁹¹ The Supreme Court's holding in *Rutan* requires a reexamination of the viability of this distinction. If loss of a transfer or promotion is considered a significant penalty triggering strict scrutiny, loss of a lucrative government contract should evoke the same analysis. It is difficult to understand how the patronage practice regarding independent contractors is necessary to preserve the democratic process.⁹² As in the case of government employees, an exception would be recognized for those situations in which political affiliation is an appropriate requirement for effective job performance. Further, the Court's broad language in *Rutan* denouncing unconstitutional conditions on government benefits appears to encompass government

88. 414 U.S. 70 (1973).

89. *Id.* at 83.

90. *But see* *Fox & Co. v. Schoemehl*, 671 F.2d 303, 305 n.3 (8th Cir. 1982) (rejecting the analogy to *Lefkowitz*, reasoning that the balance could be struck differently when weighing governmental interests against first amendment as compared to fifth amendment rights).

91. The Seventh Circuit, in *LaFalce*, specifically focused on the difference between losing a contract and losing one's job. 712 F.2d at 294. This same distinction was relied upon by the Third Circuit in *Horn*, 796 F.2d at 675. As argued in *Horn*, an independent contractor with substantial economic dependence on the state could obviously suffer harm as severe as that of an employee who is discharged. *Id.* at 675 n.9. More basically, the Supreme Court's opinion in *Rutan* suggests that loss of employment is not the only form of penalty which triggers the protection of the first amendment.

92. *See also* Comment, *Political Patronage in Public Contracting*, 51 U. CHI. L. REV. 518 (1984). The author persuasively argued that there is "no legally relevant distinction" between employees and contractors in terms of either the government's interest in using patronage or the contractor's interest in free speech. *Id.* at 520. He also noted that patronage pressure on the contractor may lead to pressure on the contractor's employees, thus allowing government to do indirectly that which it is forbidden to do directly by *Elrod*. *Id.* at 536.

contracts.⁹³ On the other hand, *Rutan* was a 5-4 decision, authored by Justice Brennan, and his absence from the Court could signal the end of the expansionist approach to providing first amendment protection from political patronage practices.⁹⁴ In fact, Justice Scalia in dissent predicted that the unmanageable flood of litigation that inevitably will be triggered by this new decision will lead the Court "to reconsider [its] intrusion into this entire field."⁹⁵

III. DUE PROCESS CLAIMS

In recent years, the United States Supreme Court has significantly restricted the scope of the due process clause as a means of challenging government official wrongdoing.⁹⁶ Nonetheless, the due process guarantee continues to be one of the most litigated constitutional provisions, as demonstrated by the large number of state and lower federal court decisions that address both procedural and substantive due process issues.⁹⁷

A. Procedural Due Process

In adjudicating procedural due process claims, the lower courts continue to apply the Supreme Court's well-established two-pronged analysis. It requires a plaintiff initially to identify a property or liberty interest. If this burden is met, the court balances the competing interests to determine whether sufficient procedural safeguards have been afforded.⁹⁸

93. See *supra* note 87 and accompanying text.

94. Justice Scalia argued in dissent not only that the extension of *Elrod* is impermissible, but that history has proved that *Elrod* itself should be overturned because the Court was wrong in failing to recognize the significance of the patronage system in terms of promoting political stability and facilitating the social and political integration of previously powerless groups. *Rutan*, 110 S. Ct. at 2756-58.

95. *Id.* at 2758-59 (Scalia, J., dissenting).

96. See, e.g., *Zinerman v. Burch*, 110 S. Ct. 975 (1990) (when deprivation of liberty has occurred as a result of random, unauthorized official misconduct, procedural due process is not violated provided an adequate post-deprivation remedy exists under state law); *DeShaney v. Winnebago County Dept. of Social Serv.*, 109 S. Ct. 998 (1989) (government cannot be held liable for injury inflicted by third parties absent a special relationship where government assumes an affirmative duty to provide protective or other services); *Graham v. Connor*, 109 S. Ct. 1865 (1989) (claims that law enforcement officials used excessive force in the course of an arrest, investigatory stop, or other seizure of a person must be analyzed under the fourth amendment rather than the more general substantive due process clause); *Daniels v. Williams*, 474 U.S. 327 (1986) (claims of mere negligent deprivation of property or liberty are not actionable under the due process clause).

97. Although procedural due process prescribes the manner in which government may proceed when affecting an individual's legal interests or status, substantive due process serves as a more general bar against arbitrary government action. See *Daniels*, 474 U.S. at 337.

98. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Under the first part of the analysis, state or local law, contract, or custom often dictates whether a property or liberty interest has been created.⁹⁹ In Indiana, most employees are viewed as "at-will" employees whose jobs may be terminated without any procedural protection. For example, in *McMillian v. Svetanoff*,¹⁰⁰ the Seventh Circuit held that because under Indiana law, court reporters serve "at the pleasure of [the] senior judge,"¹⁰¹ plaintiff was an at-will employee and had no constitutionally protected property interest in retaining her position as a court reporter.¹⁰² Thus, she could be terminated without notice, a statement of reasons, or an opportunity to respond. In *Merritt v. Broglin*,¹⁰³ the Seventh Circuit examined the Indiana administrative code to determine whether it created a liberty interest on behalf of inmates seeking temporary leave upon the death of certain relatives. In denying the existence of a liberty interest, the court emphasized that before a liberty interest will be found, the state must have placed substantive and not merely procedural limitations on official discretion.¹⁰⁴ The court noted that generally it should be wary to find state-created liberty interests on behalf of prisoners in light of the special circumstances of the prison environment.¹⁰⁵

In contrast to these decisions, the Indiana Supreme Court in *Speckman v. City of Indianapolis*¹⁰⁶ found that a previous settlement agreement reached between Speckman and the city was a written employment contract that may have created a legitimate claim of entitlement on behalf of Speckman to continued employment.¹⁰⁷ Thus, the trial court erred in granting a motion to dismiss the property interest claim. In addition, Speckman argued that he had a liberty interest in his good name and reputation and was therefore entitled to an opportunity to clear his name at a pre-termination hearing.¹⁰⁸ Although the Supreme Court has held that defamation alone is not a deprivation of liberty,¹⁰⁹ the Court has

99. See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (a legitimate claim of entitlement is created, and its dimensions defined "by existing rules or understandings that stem from an independent source such as state law").

100. 878 F.2d 186 (7th Cir. 1989).

101. IND. CODE § 33-5-29.5-8(a) (1988).

102. *McMillian*, 878 F.2d at 192.

103. 891 F.2d 169 (7th Cir. 1989).

104. *Id.* at 172.

105. *Id.* Cf. *Colon v. Schneider*, 899 F.2d 660 (7th Cir. 1990) (penal regulations governing the use of mace did not create a federally protected liberty interest on behalf of inmates; regulations must employ language of an unmistakably mandatory character in order to find a constitutionally protected liberty interest).

106. 540 N.E.2d 1189 (Ind. 1989).

107. *Id.* at 1193.

108. *Id.*

109. *Paul v. Davis*, 424 U.S. 693 (1976).

implied that if government defames an individual in connection with a termination even from an at-will job, deprivation of a liberty interest in pursuing one's career may be implicated.¹¹⁰ Because at the time of Speckman's discharge, city employees made statements to the press and to other city employees indicating that Speckman had been dishonest or even criminal in his handling of city funds,¹¹¹ the trial court erred in dismissing the claims without determining whether the alleged defamation of Speckman "was so maligning as to foreclose Speckman from continuing in the same occupation and to damage his standing in the community."¹¹² Regarding both the property and liberty claims, a remand was necessary to determine whether the procedures followed by the city fulfilled the due process requirement.¹¹³

As the Indiana Supreme Court in *Speckman* suggested, the identification of a constitutionally protected liberty or property interest does not necessarily mean that due process has been violated. The sufficiency of the procedural safeguards is determined by balancing the private interest affected, the risk of erroneous deprivation, the value of additional procedural safeguards, and the government's interest — the so-called "Mathews balancing."¹¹⁴ For example, in *Hopper v. State*,¹¹⁵ the Indiana Court of Appeals found that although Indiana law created a protected liberty interest on behalf of individuals placed under drug treatment supervision in lieu of prosecution or imprisonment,¹¹⁶ plaintiffs failed to prove a violation of procedural due process.¹¹⁷ The statute provided that before an individual could be sent back into the criminal justice system, the state must provide the same safeguards required for parole or probation revocation; namely, an opportunity to be heard prior to termination, written notice of the charges, disclosure of the state's evidence, the right to confront and cross-examine witnesses, a neutral hearing body, a statement of reasons, and a hearing at which the state bore the burden of proof.¹¹⁸ Because Hopper was afforded all of these procedural safeguards, no due process violation was found.¹¹⁹ Similarly, in *Cholewin v. City of Evanston*,¹²⁰ the court of appeals held that a police officer denied "injured-on-duty" pay was not deprived of due process when the city

110. *See* Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

111. *Speckman*, 540 N.E.2d at 1190.

112. *Id.* at 1195.

113. *Id.*

114. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

115. 546 N.E.2d 106 (Ind. Ct. App. 1989).

116. *Id.* at 109.

117. *Id.*

118. *Id.*

119. *Id.*

120. 899 F.2d 687 (7th Cir. 1990).

provided notice of the investigation concerning his eligibility as well as an interview with the investigator at which the officer was represented by counsel.¹²¹ The court reasoned that a full evidentiary hearing with the right to examine all documents and confront all witnesses was not required by due process.¹²²

Other procedural due process claims were disposed of based on the so-called *Parratt* defense. In *Parratt v. Taylor*,¹²³ the Supreme Court held that procedural due process is not violated when a deprivation of property has occurred as a result of random, unauthorized official misconduct (precluding the possibility of pre-deprivation process), provided an adequate post-deprivation remedy exists under state law.¹²⁴ In *Zinerman v. Burch*,¹²⁵ the Court extended the *Parratt* rationale to deprivations of liberty. The distinction between the application of *Mathews* balancing and *Parratt* analysis is reflected in the Indiana district court's opinion in *Pennington v. Hobson*.¹²⁶ The court reasoned that the plaintiff's challenge to the state's established criminal procedural rules was to be assessed under the *Mathews* balancing standard.¹²⁷ Claims of alleged false imprisonment are in essence a challenge to random, unauthorized official misconduct. Therefore, this claim was precluded based on the existence of an adequate state tort remedy under the Indiana Tort Claims Act.¹²⁸

The *Parratt* doctrine was also relied upon to preclude due process claims brought against the city mayor for discharging members of the board of the Gary Municipal Airport Authority District. In *Thornton v. Barnes*,¹²⁹ the Seventh Circuit concluded that because under Indiana law the plaintiffs had a fixed term in office and the right to remain in office for that term absent misconduct that would justify impeachment, they established a protectable property interest within the meaning of the due process clause.¹³⁰ Further, because the Airport Authority was a separate political subdivision, rather than an agency of the city, board members were not subject to removal by the mayor.¹³¹ Nonetheless, because Indiana law provided a remedy pursuant to a writ of *quo warranto*, the court held that the deprivation could not be deemed a denial of federal due process.¹³²

121. *Id.* at 689.

122. *Id.* at 689-90.

123. 451 U.S. 527 (1981).

124. *Id.* at 538.

125. 110 S. Ct. 975 (1990).

126. 719 F. Supp. 760 (S.D. Ind. 1989).

127. *Id.* at 776.

128. *Id.* at 775.

129. 890 F.2d 1380 (7th Cir. 1989).

130. *Id.* at 1387-88.

131. *Id.* at 1387.

132. *Id.* at 1389-90.

The court's analysis in *Thornton* raises a difficult question about whether the decision of the mayor, the city's final policymaker, can be viewed as merely "random and unauthorized." A few months after *Thornton*, the Supreme Court in *Zinermon v. Burch*¹³³ held that the failure of hospital officials to provide a hearing to an incompetent patient prior to his institutionalization could not be considered random and unauthorized because the "State delegated to [hospital officials] the power and authority to effect the very deprivation complained of here, Burch's confinement in a mental hospital, and also delegated to them the concomitant duty to . . . guard against unlawful confinement" by providing mandated procedures.¹³⁴ In other words, those who perpetrated the harm occupied high-ranking policymaking positions and thus could have instituted pre-deprivation process. Their failure to do so is not cured by the existence of post-deprivation remedies.¹³⁵

At the time of *Zinermon*, the circuits were split on whether *Parratt* applied to the conduct of high-ranking officials. Some, like the Seventh Circuit, held that *Parratt* applies "even to deprivations effected by the very state officials charged with providing pre-deprivation process."¹³⁶ These courts emphasized that any official who acts contrary to state law is acting in an "unauthorized" fashion.¹³⁷ Other courts have held *Parratt* inapplicable when officials have state-clothed authority to provide the plaintiff with a hearing.¹³⁸ These courts focus on the feasibility of providing pre-deprivation process as the key element in *Parratt*.¹³⁹ The Supreme

133. 110 S. Ct. 975 (1990).

134. *Id.* at 990.

135. *Id.*

136. *Id.* at 978 n.2.

137. See e.g. the earlier opinion in *Easter House v. Felder*, 879 F.2d 1458, 1470-74 (7th Cir. 1989), *vacated*, 110 S. Ct. 1314 (1990) (although defendant employees of state department were high-ranking officials who allegedly conspired to deprive plaintiff of its operating license, because officials acted in disregard of state policy and procedures, their conduct was "random and unauthorized" within the meaning of *Parratt*); *Martin v. Dallas County, Texas*, 822 F.2d 553, 555 (5th Cir. 1987) (quoting *Holloway v. Walker*, 790 F.2d 1170, 1174 (5th Cir. 1987) ("[f]ederal constitutional guarantees are not breached merely because some state employee, even a highly-placed one, might engage in tortious conduct")).

138. See cases cited in *Zinermon*, 110 S. Ct. at 978 n.2.

139. See e.g., *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1405 (9th Cir. 1989) (decision to destroy plaintiff's property made by senior ranking officials does not constitute random, unauthorized conduct within the meaning of *Parratt*); *Matthiessen v. North Chicago Community High School Dist.* 123, 857 F.2d 404, 407 n.3 (7th Cir. 1988) (because a single act of a sufficiently high-ranking policymaker may be deemed established state procedure, the decision of the school board, even if contrary to the school code, is not insulated by *Parratt*); *Merritt v. Mackey*, 827 F.2d 1368, 1372 (9th Cir. 1987) (*Parratt* does not apply when defendants' conduct should have been apparent to defendants' supervisors, thus making predeprivation process feasible).

Court appears to adopt the latter approach in *Zinerman*. Although the hospital officials in *Zinerman* acted contrary to the state statute governing the admission of "voluntary" patients by admitting an individual who was clearly incapable of making an informed decision at the time of his admission,¹⁴⁰ the Court nonetheless concluded that the deprivation was not "unauthorized."¹⁴¹

The Supreme Court's approach in *Zinerman* correctly redirects the lower courts to focus on the feasibility of providing pre-deprivation process. Further, it clarifies that due process claims are not barred merely because an official is acting contrary to state law.¹⁴² As the Court explained, the plaintiff "is not simply attempting to blame the State for misconduct of its employees He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation."¹⁴³ The meaning of "broadly delegated, uncircumscribed power" remains unclear. In *Thornton*, for example, the mayor had broad power "to effect the deprivation," and he obviously could have provided a hearing before he terminated the contracts of Board members. Although Mayor Barnes acted contrary to the statute requiring removal only "for misconduct that would justify impeachment," *Zinerman* makes clear that this alone does not trigger *Parratt*. On the other hand, unlike *Zinerman*, Indiana never broadly delegated power to the mayor to effect *this* deprivation. Indeed, the court found that the mayor had no authority whatsoever over the politically independent Airport Authority.¹⁴⁴ Arguably, the conferral of authority problem should affect only the question of municipal liability,¹⁴⁵ thereby allowing suit

140. *Zinerman*, 110 S. Ct. at 982. Florida's statute allowed admission under its voluntary provision only for adults "making application by express and informed consent," and the latter clause was defined as "consent voluntarily given in writing after sufficient explanation and disclosure . . . to enable the person . . . to make a knowing and willful decision" *Id.*

141. *Id.* at 990.

142. *Id.*

143. *Id.* at 989.

144. See *Thornton v. Barnes*, 890 F.2d 1380, 1387 (7th Cir. 1988). The mayor's raw abuse of power is perhaps better analyzed as a violation of substantive due process, which guarantees protection from government conduct that cannot be taken regardless of the procedural safeguards provided. See discussion, *infra* notes 173-74 and accompanying text. Especially enlightening in this context is the Indiana Court of Appeals holding in *Stewart v. Ft. Wayne Community Schools*, discussed *infra* notes 182-85, that cancellation of a tenured psychometrist's contract was so arbitrary and irrational as to violate substantive due process.

145. The question of municipal liability for isolated government official misconduct is governed by the Supreme Court decision in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), in which a divided Court held that a city may be held liable for a single decision of a policymaker. The breadth of *Pembaur* was somewhat limited, however, by

against Mayor Barnes but not the entity, for depriving the plaintiffs of their property right without due process of law.¹⁴⁶ Whether courts will interpret *Zinermon* this broadly remains to be seen. If the Supreme Court's analysis is founded on "the State's inappropriate delegation of duty,"¹⁴⁷ the outcome in *Thornton* would be the same.

The Seventh Circuit apparently has chosen to give *Zinermon* a narrow construction. Although the Supreme Court appeared to limit *Parratt* by requiring a critical inquiry into whether the state official charged with misconduct occupies a high or low level position in the state hierarchy,¹⁴⁸ the Seventh Circuit has rejected this broad interpretation. In *Easter House v. Felder*,¹⁴⁹ the court of appeals stressed that the deprivation in *Zinermon* was not only arguably "authorized," but was also highly predictable and could be avoided in the future through the implementation of additional pre-deprivation procedural safeguards.¹⁵⁰ In essence, the state of Florida was held accountable because the state statute gave hospital officials broad discretion in admitting patients without providing necessary procedural safeguards, and it was this "statutory oversight" that caused the deprivation.¹⁵¹ The court of appeals reasoned that when the state circumscribes an official's discretion and that official's actions are patently inconsistent with state law, the conduct should be described as random and unauthorized regardless of the status of the official.¹⁵²

The Seventh Circuit's narrow construction of *Zinermon* is not totally unfounded. In rejecting the applicability of *Parratt*, the Supreme Court listed three separate distinguishing features: (1) the deprivation was fore-

the plurality decision in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), in which the Court noted that "[w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Id.* at 127.

146. Regarding the mayor's own personal liability, unless the plaintiffs proved that the mayor violated rights that were clearly established at the time the action occurred, he enjoyed immunity from liability for damages. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Because, however, the plaintiffs on appeal sought only reinstatement, and not damages, this is not an issue in this case. *Thornton*, 890 F.2d at 1385 n.7.

147. *Zinermon*, 110 S. Ct. at 995 (O'Connor, J., dissenting).

148. *Id.* at 987-90.

149. 910 F.2d 1387 (7th Cir. 1990).

150. *Id.* at 1401.

151. *Id.*

152. *Id.* at 1400. This conclusion is not necessarily dictated by *Zinermon*. In *Zinermon*, the hospital officials' discretion was circumscribed by a requirement that "voluntary" admissions be limited to those who are truly capable of giving informed consent, and it was conceded that the officials acted contrary to state statute. 110 S. Ct. at 982. The Court's concern, however, was with the officials' failure to provide constitutionally required procedural safeguards, even if the state constitutionally could have a statutory scheme that gave officials broad power and little guidance as to the admission process. *Id.* at 988.

seeable because it is highly likely that persons requesting treatment for mental illness might be incapable of informed consent; (2) pre-deprivation process was not impossible; and (3) the officials' conduct could not be characterized as "unauthorized" since the state delegated to them the power and authority to effect the deprivation.¹⁵³ If *Zinerman* is interpreted to require the coalescence of all three of these factors, its precedential value is significantly limited. In *Thornton*, for example, even if state law had delegated authority to the mayor to remove members of the board of the Airport Authority, it cannot be seriously argued that deprivations of property in this context are foreseeable and likely to occur. If interpreted to require this element, *Zinerman* will be limited to unique cases involving blatant "statutory oversight."¹⁵⁴

The Seventh Circuit's analysis in *Easter House* expands *Parratt* far beyond its appropriate reach. The logic of the *Parratt* doctrine is that because the state cannot foresee random and unauthorized deprivations, it is not possible to provide pre-deprivation process; thus, the existence of post-deprivation relief defeats the federal claim.¹⁵⁵ When the state vests high ranking officials with authority and power to provide pre-deprivation process, and it is clearly feasible for them to do so, the existence of state remedies should be irrelevant. Contrary to the Seventh Circuit's narrow construction, the Fifth Circuit has interpreted *Zinerman* to limit *Parratt* "to cases where it truly is impossible for the state to provide pre-deprivation procedural due process before a person unpredictably is deprived of his liberty or property through the unauthorized conduct of a state actor."¹⁵⁶ Rather than requiring that a particular deprivation be foreseeable,¹⁵⁷ the court construed *Zinerman* to require only that the deprivation be one that occurs at a predictable time, thus making the

153. *Zinerman*, 110 S. Ct. at 989-90.

154. See, e.g., *Caine v. Hardy*, 905 F.2d 858, 865 (5th Cir. 1990) (Jones, J., dissenting) (arguing that the "import" of *Zinerman* must be judged by its unique facts, namely, "both a high risk of erroneous deprivation of a mentally ill person's liberty, and the substantial likelihood that minimal further procedural safeguards could readily have avoided the deprivation"). As Judge Jones explained, *Zinerman* requires "a hard look . . . to determine whether the state official's conduct, under all the circumstances of the deprivation, could have been adequately foreseen and addressed by procedural safeguards." *Id.* Under this analysis, because the state of Indiana could not anticipate that Mayor Barnes would act contrary to state law and assume authority to discharge Airport Authority members, *Parratt* would control. Cf. *Katz v. Klehammer*, 902 F.2d 204, 207 n.1 (2d Cir. 1990) (*Zinerman* does not affect the situation in which defendants are charged with violating various laws and regulations because a state rule directing persons in their position to hold a hearing before violating any rule or regulation would be senseless).

155. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

156. *Caine v. Hardy*, 905 F.2d 858, 862 (5th Cir. 1990).

157. *Id.* at 861 (citing *Zinerman*, 110 S. Ct. at 989).

institution of procedural safeguards "feasible."¹⁵⁸ Under this analysis, a mayor with broad authority over personnel decisions could be charged with procedural violations, regardless of "the likelihood" that violations would occur.

The *Thornton* court, without the guidance provided in *Zinerman*, summarily concluded that the existence of a post-deprivation remedy precludes the federal claim without any critical inquiry into whether the mayor's conduct should be deemed "random and unauthorized," or whether his failure to provide pre-deprivation process violated the due process clause.¹⁵⁹ Although the mayor's lack of statutory authority over the Airport Authority makes this a more difficult case, the Seventh Circuit's subsequent focus on "predictability" and "statutory oversight" in *Easter House* unnecessarily restricts *Zinerman* to its unique facts. Nonetheless, since *Zinerman* was a close decision, and one of those in the majority, Justice Brennan, no longer sits on the bench, the Seventh Circuit's narrow interpretation could prevail.¹⁶⁰

Finally, in a case involving an alleged clash between two competing constitutional rights, the Indiana Supreme Court was asked to balance the due process rights of county officers against the first amendment rights of the press. In *Merit Board v. People's Broadcasting Corp.*,¹⁶¹ the media sought to enjoin the county sheriff's Merit Board's plans for a closed executive session to discuss the need for disciplinary action against sheriff deputies.¹⁶² Initially, the state supreme court determined that Indiana's Open Door Law specifically authorized closed executive sessions to discuss "an individual's status as an employee."¹⁶³ Although

158. *Id.*

159. *Thornton*, 890 F.2d at 1389.

160. *See, e.g., Easter House*, 910 F.2d at 1409 (Easterbrook, J., concurring) (acknowledging the potential broader interpretation of *Zinerman*, but then concluding that Judge Kanne "offers the best estimate of the course a majority of the [Supreme] Court will take. . ."). Ironically, in *Caine v. Hardy* the Fifth Circuit predicted that the earlier *Easter House* opinion, pending on appeal at the time of *Zinerman*, would have to be reversed on remand because the Supreme Court's new analysis was controlling. Instead, by focusing on the "uncircumscribed" authority aspect of *Zinerman* and the element of predictability, the Seventh Circuit on remand reaffirmed its previous opinion that *Parratt* foreclosed claims brought by a private adoption agency against state officials for allegedly conspiring to delay the agency's licensing and violating state procedural steps in granting a license to a competitor. *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990).

161. 547 N.E.2d 235 (Ind. 1989).

162. *Id.* at 236.

163. *Id.* at 237 (citing IND. CODE § 5-14-1.5-6(b)(5)(A)(B) (1987). The statute provides, "(b) Executive sessions may be held only in the following instances: (5) 'With respect to any individual over whom the governing body has jurisdiction: (A) To receive information concerning the individual's alleged misconduct; and (B) To discuss, prior to any determination, that individual's status as an employee'" IND. CODE ANN. § 5-14-15-6(b)(5)(A)(B) (West Supp. 1989).

another Indiana statute requires the Merit Board to conduct a "fair public hearing"¹⁶⁴ before taking disciplinary action, the court concluded that this meant presentation of evidence and the entertainment of argument about the evidence in public, but it did not foreclose private discussions and deliberations as permitted under the Open Door Law.¹⁶⁵

After discussing the statutory conflict, the court addressed the constitutional claims. First, the court sustained its interpretation as comporting with federal due process. Recognizing that a property interest had been created on behalf of the deputies,¹⁶⁶ it reasoned that the risk of an erroneous deprivation actually would be enhanced if board members were required to conduct their deliberations in public.¹⁶⁷ The court stressed "the chilling effect of requiring board members to muse publicly about the relative credibility or dubiousity of the witnesses and parties before them."¹⁶⁸ Thus, under *Mathews*, interpreting the statutes to require the deputies' fate to be deliberated at less protective open sessions would mean a deprivation of the deputies' due process rights.¹⁶⁹ Although normally the assertion that closed deliberations are more protective of individual property rights than open deliberations appears incongruous, it must be noted that in this case it was the press, not the deputies, who sought an open hearing.¹⁷⁰ Regarding the latter's claim, press rights were summarily rejected, based on precedent holding that the first amendment does not afford the press a right of access to internal agency deliberations.¹⁷¹ Thus, the trial court's order that the Merit Board's deliberations had to be conducted openly was erroneous.¹⁷²

B. Substantive Due Process

In the absence of so-called fundamental rights,¹⁷³ the Supreme Court has held that the due process clause is not violated unless the government's

164. *People's Broadcasting Corp.*, 547 N.E.2d at 237 (citing IND. CODE § 36-8-10-11 (1987)). The statute provides, in pertinent part, "The sheriff may dismiss, demote, or temporarily suspend a county police officer for cause after preferring charges in writing and after a fair public hearing before the board . . ." IND. CODE ANN. § 36-8-10-11 (West Supp. 1989).

165. *People's Broadcasting Corp.*, 547 N.E.2d at 238-39.

166. *Id.* at 239. The court reasoned that the Merit Board statute, Ind. Code § 36-8-10-11(a), created a legitimate claim of entitlement on behalf of the sheriff deputies.

167. *People's Broadcasting Corp.*, 547 N.E.2d at 240.

168. *Id.* at 239-40.

169. *Id.* at 240.

170. *Id.*

171. *Id.*

172. *Id.*

173. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965), recognizing a funda-

action is totally arbitrary and capricious.¹⁷⁴ The deferential approach dictated by this standard is reflected in several decisions. For example, in *Estate of Himmelstein v. City of Ft. Wayne*,¹⁷⁵ the Seventh Circuit held that requiring the plaintiffs in a contested zoning dispute to appear before the governmental body and subsequently denying them building permits was not the type of arbitrary, irrational action that triggers a viable substantive due process claim.¹⁷⁶ The court emphasized that government decisions motivated by local interests do not violate substantive due process, and that courts should be reluctant to assume the role of a zoning board of appeals.¹⁷⁷ Similarly, in *Northside Sanitary Landfill, Inc. v. City of Indianapolis*,¹⁷⁸ the Seventh Circuit held that the city could rationally prohibit the plaintiff from using the city's landfill based on its fear that chemicals might seep into its water supply and expose the city to liability for clean-up costs.¹⁷⁹ The court noted that government action passes the rational basis test for due process if sound reasons are hypothesized, even if they cannot be proved to the court's satisfaction.¹⁸⁰ Thus, the district court was not required to hold a trial to determine whether the city's reasons were the real reasons for declaring its dump "off limits."¹⁸¹

Despite this highly deferential approach, the Indiana Court of Appeals, in *Stewart v. Fort Wayne Community Schools*,¹⁸² held that cancellation of the contract of a tenured psychometrist was so irrational and arbitrary that it violated plaintiff's federal right to substantive due process.¹⁸³ Because the school board followed rescinded procedures that were in-

mental right to marital privacy, which triggered the beginning of modern substantive due process analysis. This right to privacy has been extended to include the controversial right to terminate a pregnancy, *Roe v. Wade*, 410 U.S. 113 (1973), as well as the right to make basic familial decisions, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

174. *Zinerman v. Burch*, 110 S. Ct. 975, 983 (1990). *See also*, *Washington v. Harper*, 110 S. Ct. 1028, 1037 (1990) (even if individuals have a fundamental right to be free from the administration of antipsychotic medication absent compelling justification, when dealing with prisoner's rights, it suffices that the state's involuntary medication policy be "reasonably related to legitimate penalogical interests").

175. 898 F.2d 573 (7th Cir. 1990).

176. *Id.* at 577-78.

177. *Id.* at 578.

178. 902 F.2d 521 (7th Cir. 1990).

179. *Id.* at 522.

180. *Id.* The court noted that although states can give their own courts "greater superintendence of legislation than the fourteenth amendment requires," federal courts may ask only "whether the law has a rational basis, not whether the facts support the decision." *Id.* at 523.

181. *Id.* at 522.

182. 545 N.E.2d 7 (Ind. Ct. App. 1989).

183. *Id.* at 12.

consistent with state statutory licensing requirements, the court found a viable substantive due process claim which would entitle the plaintiff to damages, equitable relief, and attorneys fees.¹⁸⁴ The court of appeals relied on a 1974 Seventh Circuit decision suggesting that a substantive due process violation exists when the reason for an employment termination is "so inadequate that the judiciary will characterize it as 'arbitrary.'"¹⁸⁵ Although more recent Seventh Circuit precedent casts doubt on whether substantive due process should ever be available to protect a state-created property interest in employment,¹⁸⁶ other appellate courts have used substantive due process in employment discharge cases, although at the same time imposing a heavy burden on the employee to show that there is no rational basis for the discharge.¹⁸⁷

IV. CONCLUSION

This past year Indiana litigants have presented state and federal courts with a host of novel federal constitutional claims. The protection to be afforded nude dancing and independent contractors seeking insulation from patronage practices poses extremely difficult, controversial questions. Although many of the due process claims were resolved under traditional, well-established doctrine, other cases raised difficult questions about both the appropriateness of relying on state tort remedies to defeat federal procedural due process claims and the scope of substantive due process as a means of challenging abuses of government power.

184. *Id.*

185. *Id.* (citing *Jeffries v. Turkey Run Consol. School Dist.*, 492 F.2d 1, 3-4 (7th Cir. 1974)).

186. *See, e.g., Brown v. Brien*, 722 F.2d 360, 366-67 (7th Cir. 1983) (substantive due process does not provide protection for a state-created property interest in employment).

187. *See, e.g., Morris v. Clifford*, 903 F.2d 574, 577 (8th Cir. 1990) (plaintiff had a clearly established substantive due process right as a tenured faculty member to be discharged only for adequate cause); *Newman v. Massachusetts*, 884 F.2d 19, 25 (1st Cir. 1989) (allegations that school authorities made an arbitrary and capricious decision that significantly affected a tenured teacher's employment status states a viable substantive due process claim); *Honore v. Douglas*, 833 F.2d 565, 569 (5th Cir. 1987) (although judicial restraint should be used in employment cases, courts should not provide "slavish deference" to a university's arbitrary deprivation of a vested property right); *Schaper v. City of Huntsville*, 813 F.2d 709, 716-17 (5th Cir. 1987) (police captain has a substantive due process right to continued employment); *Gargiul v. Tompkins*, 704 F.2d 661, 668 (2d Cir. 1983), *vacated on other grounds*, 465 U.S. 1016 (1984) (substantive due process requires that actions impeding a tenured teacher's property interest in continued employment must have a rational basis to a proper governmental purpose). *See also Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 867 (1990) (noting the conflict among the circuits about whether substantive due process creates a right to be free of arbitrary, capricious, or pretextual discharges from employment).

Survey of Recent Developments in Indiana Criminal Law and Procedure

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I. INTRODUCTION

This Article surveys important developments in Indiana criminal law and procedure over the past year.¹ Section I highlights changes in the substantive law of crimes. As usual, this area is relatively static, and therefore the section is brief. Section II highlights changes in criminal procedure. As usual, this area is dynamic and the section is therefore much longer. Although this is a survey of Indiana law, many of the developments discussed are from the United States Supreme Court cases. This is necessarily so. No one can practice criminal law, in this state or in any other, without realizing that a great majority of procedures are driven by the United States Constitution, as that document is continually interpreted by the high court.

The Indiana appellate courts, too, devoted a large portion of their energies to issues of criminal procedure. Those decisions are highlighted as well.

II. SUBSTANTIVE CRIMINAL LAW

A. *The Mens Rea Requirement*

In *State v. Keihn*,² the Indiana Supreme Court faced the question of what *mens rea*, defined as "culpability" under the Model Penal Code and the Indiana Code,³ must be proved when the pertinent statute is silent on the question. At issue was Indiana Code section 9-1-4-52(a), which provides as follows:

A person may not operate a motor vehicle upon the public highways while his driving privilege, license, or permit is suspended or revoked. A person who violates this subsection commits a class A misdemeanor.⁴

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1. January 1990 to December 1990.

2. 542 N.E.2d 963 (Ind. 1989).

3. See IND. CODE § 35-41-2-2 (1988) and MODEL PENAL CODE § 2.02 (1962).

4. IND. CODE § 9-1-4-52(a) (1988 & Supp. 1990).

Does a person who drives without knowledge of suspension or revocation violate this provision? In *Keihn*, the court answered this question in the negative.⁵

Unless the legislature is constitutionally prohibited from defining a crime without an element of *mens rea*,⁶ which the defendant did not argue, the court's task is to discover legislative intent. Because nothing in the legislative history of this statute spoke explicitly on this point, the court was placed in the position of applying general rules of legislative construction. Previous Indiana cases, however, pointed in opposing directions.⁷

The court in *Keihn* cited with approval sections from the 1974 Indiana Criminal Law Study Commission which were not formally adopted and, although it does not indicate such precisely, the court strongly suggests that future cases will be judged by the methodology of those provisions: for felonies and misdemeanors that are silent on *mens rea*, the assumption is that "wilfully" must be proved;⁸ for infractions silent on *mens rea*, the assumption is that no *mens rea* need be proved.⁹ The logic of this approach is evident. When a serious criminal penalty is involved, one cannot assume that the legislature would command punishment without proof of culpability. Strict liability in crime runs contrary to history.¹⁰ If, on the other hand, the liability is for a noncriminal infraction, one cannot lightly assume that the legislature intended to put the state to the burdens usually associated with criminal prosecution. This approach, of course, applies only when legislative intent is unclear. The legislature is, within constitutional limits, free to specify whatever *mens rea* or lack thereof it wishes, provided it does so clearly and explicitly.

B. The Defense of "Impossibility"

In *State v. Haines*,¹¹ the Indiana Second District Court of Appeals was confronted by a beguiling juxtaposition of the old (the "impossi-

5. *Keihn*, 542 N.E.2d at 965.

6. There is considerable question whether a state could constitutionally remove proof of *mens rea* for traditionally serious crimes such as murder. See, e.g., *Patterson v. New York*, 432 U.S. 197 (1977).

7. For example, under IND. CODE § 9-4-1-40 (1988), leaving the scene of an accident has been interpreted to require proof of knowledge of the accident. See *Micinski v. State*, 487 N.E.2d 150 (1986). On the other hand, under IND. CODE § 9-11-2-2 to -5 (1988), driving while intoxicated and causing death does not require proof of knowledge of intoxication. See *Smith v. State*, 496 N.E.2d 778 (Ind. Ct. App. 1986).

8. "Wilfully" means intentionally, knowingly, or recklessly. See IND. CODE § 35-41-2-2 (1988).

9. *Keihn*, 542 N.E.2d at 967.

10. *Id.* at 966.

11. 545 N.E.2d 834 (Ind. Ct. App. 1989).

bility" defense to attempt) and the new (the AIDS virus). Police, responding to a call reporting a possible suicide attempt, discovered the defendant unconscious in a pool of blood. Upon regaining consciousness, the defendant informed the officers he had AIDS; threatened to "give it to them;" shook his body for the express purpose of splashing his blood on the officers' faces and eyes; bit the officers and splashed his blood on the open wounds; and hit one officer in the face with a wig dripping with defendant's blood. On this evidence, the defendant was convicted by a jury of three counts of attempted murder. The trial court subsequently granted the defendant's motion for judgment on the evidence and vacated the conviction. The State appealed.

Judge Buchanan, writing for the court of appeals, reversed and remanded with instructions to reinstate the jury verdict. The appellate court examined the case for, *inter alia*, the defense of "impossibility."¹² The traditional approach to attempt differentiated "factual impossibility," which is not a defense, from "legal impossibility," which is a defense.¹³ This distinction, which has puzzled generations of law students, is not an easy one to draw.¹⁴ The distinction essentially is between trivial or temporary factual mistakes¹⁵ and profound or permanently incurable mistakes.¹⁶ This distinction became unimportant in states, such as Indiana, that adopted the Model Penal Code provisions on inchoate crimes.¹⁷ Under those provisions, *neither* type of impossibility is a defense.¹⁸ Judge

12. *Id.* at 838.

13. W. LAFAYE & A. SCOTT, CRIMINAL LAW § 6.3 (2d ed. 1986).

14. There is no use trying to think of "factual impossibility" as entailing a factual mistake and "legal impossibility" as entailing a legal mistake. Defendants who think their actions are criminal when they are not (who might, in common parlance, be said to be making a legal mistake) simply have no criminal *mens rea* and thus need no "defense."

15. *Mitchell v. State*, 71 S.W. 175 (Mo. 1902) (defendant who shot toward a bed thinking the victim was there only to discover he was in another room).

16. Such as in the paradigmatic case of trying to kill someone who is already dead.

17. IND. CODE § 35-41-5-1 (1988).

18. This change was driven by the Model Penal Code drafters' radically different understanding of the fundamental purposes for inchoate crimes, including attempt. Whereas the common-law approach focused on preventing social harm (and, thus, was not troubled by defendants trying to kill dead people because no harm was possible), the Model Penal Code's inchoate crime provisions are aimed at identifying "manifestly dangerous persons." 2 MODEL PENAL CODE PART I COMMENTARIES § 5.01 (1985). Simply put, defendants who try to kill dead people are dangerous because they form a criminal *mens rea* and act on that intention. The Model Penal Code recognizes "inherent impossibility" — that is, choosing a method of committing a crime that is facially inappropriate to achieve the intended result (such as throwing darts at x's picture with the intent to kill x). *Id.* However, this "inherent impossibility" is not a defense even under the Model Penal Code, but simply a factor to mitigate the sentence. *Id.* In any event, "inherent impossibility" is

Buchanan's opinion makes it clear that impossibility is not a defense to attempt in Indiana.¹⁹

In *Haines*, the defendant also argued, and the trial court apparently agreed, that the defendant had not taken a "substantial step" toward commission of the crime, which is the test for the required "act" element.²⁰ However, as Judge Buchanan noted, this argument confuses the "act" requirement with the impossibility defense.²¹ Not only did the defendant commit *sufficient* acts under the substantial-step test, he committed *all* the acts he intended.²² In measuring acts, courts must adopt the defendant's perspective on reality, in this case, that biting and blood-splashing can infect the victim with a deadly disease.²³ To adopt some other reality (for example, that biting cannot transfer the AIDS virus) is to consider the "impossibility" question under the guise of an "act."

III. CRIMINAL PROCEDURE

A. Arrest, Search, and Seizure

1. *The Beneficiaries of the Fourth Amendment.*—In *United States v. Verdugo-Urquidez*,²⁴ federal officials searched, with the permission of Mexican authorities, the defendant's home in Mexico. The defendant was a foreign national and his only entry into the United States had occurred three days earlier when he was involuntarily forced into the United States under federal arrest. Clearly the warrantless search of his house would not pass muster under the fourth amendment;²⁵ however, the United States Supreme Court held 6-3 that the defendant was not included within the meaning of "the people" in the fourth amendment.²⁶ Had the defendant been a resident alien or even an illegal alien, the result might be different. However, the defendant had insufficient connection with the United States to claim the benefit of fourth amendment protection.²⁷ The dissent asserted that compliance with the fourth amend-

foreclosed in this case because expert testimony showed that one could, by actions similar to those of the defendant, infect a victim with the AIDS virus, and that such virus could produce the death of the victim. *Haines*, 545 N.E.2d at 841.

19. *Haines*, 545 N.E.2d at 838-39.

20. *Id.* at 836.

21. *Id.* at 838.

22. *Id.* at 841.

23. *Id.*

24. 110 S. Ct. 1056 (1990).

25. See, e.g., *Payton v. New York*, 445 U.S. 573 (1980).

26. *Verdugo-Urquidez*, 110 S. Ct. at 1064.

27. *Id.*

ment was an unavoidable correlative of the power to prosecute foreign nationals under United States penal laws.²⁸

2. *Reasonable Expectation of Privacy*.—The Supreme Court has long recognized that homeowners, tenants, and paying hotel guests have a reasonable expectation of privacy in those spaces.²⁹ The Supreme Court in *Minnesota v. Olson*³⁰ extended the expectation of privacy to overnight, nonpaying guests in private homes.³¹ The Court was careful to explain that its holding does not indicate that everyone lawfully on premises has this expectation.³² In *Olson*, the defendant, an overnight guest of the homeowner, had interests sufficiently similar to paying guests in hotels, motels, and boardinghouses to receive fourth amendment protection.³³ However, nothing in the opinion suggests that daytime guests in a private home would, without more, gain this protection.

3. *Search Incident to Arrest*.—The most common type of a warrantless search is the search incident to lawful arrest.³⁴ The United States Supreme Court decided three cases in this area.

In *Smith v. Ohio*,³⁵ two policemen approached the defendant and his companion because the police were curious about the brown paper bag that the defendant was carrying which was marked "Kash n' Karry" and "Loaded with Low Prices." Clearly no probable cause existed for an arrest, and the State of Ohio made no *Terry*³⁶-type stop-and-frisk argument. The State conceded that the officers were acting on a mere hunch.³⁷ When the defendant was stopped, the defendant threw the bag on the hood of his car and turned to face the police. The police opened the bag and discovered illegal paraphernalia. The State argued that this discovery justified the initial stop.³⁸ The Supreme Court held 9-0 that the fruits of a search cannot supply the probable cause for the arrest to which the search is then incident.³⁹ Although the Court did not use terms such as "bootstrap" or "circularity," such terms fairly characterize the argument the State of Ohio relied upon.

28. *Id.* at 1077 (Brennen, J., dissenting).

29. "Reasonable expectation of privacy" is the current test for determining whether police conduct is a "search." See *Katz v. United States*, 389 U.S. 347 (1967).

30. 110 S. Ct. 1684 (1990).

31. *Id.* at 1689-90.

32. *Id.* at 1687.

33. *Id.* at 1690.

34. Berner, *Search and Seizure: Status and Methodology*, 8 VAL. U.L. REV. 471, 534 (1974).

35. 110 S. Ct. 1288 (1990).

36. *Terry v. Ohio*, 392 U.S. 1 (1968).

37. *Smith*, 110 S. Ct. at 1289.

38. *Id.* at 1290.

39. *Id.*

*Maryland v. Buie*⁴⁰ is a significant case concerning the power of police to "sweep" a house incident to arrest. In *Buie*, two men had just robbed a Godfather's Pizza, and one was arrested in his home after fresh pursuit. After securing him, the police walked into the basement to look for the other perpetrator and found, instead, evidence of defendant's involvement in the crime, a red running suit. The United States Supreme Court held that, incident to an arrest in a house, the police may conduct a "protective sweep" of an area if they possess a "reasonable belief based on specific, articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene."⁴¹ The Court rejected the government's request for an "automatic" right to make such a sweep incident to all arrests in homes,⁴² but indicated in *dicta* that an automatic right exists to search "closets and other spaces immediately adjacent to the place of arrest from which an attack could be immediately launched."⁴³ This innocent sounding sentence likely will spawn much litigation. Outside this immediate area, however, the *Terry* "reasonable suspicion" standard is required.⁴⁴ So long as the police conduct a proper cursory check of only those places where persons might be hiding, anything that the police observe falls within the "plain view" doctrine and is admissible.⁴⁵

*New York v. Harris*⁴⁶ raised a subtle question under the "fruit-of-the-poisonous-tree" doctrine.⁴⁷ Police arrested Harris in his home for murder. The police had probable cause but no warrant to enter his home; thus, the arrest violated the fourth amendment under the authority of *Payton v. New York*,⁴⁸ which requires a warrant to enter a private home to make an arrest, even though such arrest could be made without a warrant in any other place.⁴⁹ After being taken to the station, Harris made a Mirandized confession. The Supreme Court held 5-4 that the statement was not tainted by the *Payton* violation.⁵⁰ Unlike an arrest made without probable cause, the Court reasoned that the custody

40. 110 S. Ct. 1093 (1990).

41. *Id.* at 1099-1100.

42. *Id.*

43. *Id.* at 1098.

44. *Id.*

45. *See, e.g., Harris v. United States*, 390 U.S. 234 (1968).

46. 110 S. Ct. 1640 (1990).

47. This doctrine, which has a variety of applications, provides that any product (such as statements or hard evidence) of prior illegal police behavior is tainted with such illegality and, thus, excluded. *See, e.g., Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

48. 445 U.S. 573 (1980).

49. *Id.* at 600.

50. *Harris*, 110 S. Ct. at 1644.

resulting from such arrest is not itself illegal after the arrestee is taken from his home.⁵¹ The interest invaded is not a liberty interest, but a privacy interest centered in the home.⁵² Indeed, the trial court ruled that statements Harris made while still in the home were inadmissible.⁵³ After the suspect is removed from the home, the taint is removed.⁵⁴ Of course, any statement taken after the defendant is removed from the home would have to comply with the fifth and sixth amendments.⁵⁵

4. *Third-party Consent*.—Fourth amendment privacy interests can be lost through consent to search, including consent given by a third party.⁵⁶ The test for determining whether the third party had the power to give consent is whether the person giving consent had sufficient dominion and control over the space.⁵⁷ *Illinois v. Rodriguez*⁵⁸ raises the interesting problem of consent given by someone the police had every reason to believe was a co-occupant of the house but who had, in fact, recently moved from the residence. The Supreme Court held 6-3 that the consent was operative because police action which is reasonable, though mistaken, cannot be deterred and need not be remedied.⁵⁹ This case reinforces a critical fourth amendment lesson that the proper perspective from which to judge police conduct is the facts as they appear to a reasonable police officer.⁶⁰ When a police officer is reasonably mistaken, the officer's actions can only be sensibly judged by adopting the officer's perspective on reality. To judge such actions in light of facts not accessible to the officer is illogical. The converse is also true. A police officer who makes an unreasonable search of a house and is lucky to find contraband cannot defend the action based on the outcome of the search.

5. *Automobile Inventories*.—*Florida v. Wells*⁶¹ is a case whose dicta is far more important than its holding. The Supreme Court previously had approved inventory searches of impounded vehicles including a search of closed containers, provided those searches were "routine" or "stan-

51. *Id.* at 1644-45.

52. *Id.* at 1643.

53. *Id.* at 1642.

54. *Id.* at 1643 (had Harris been arrested on the street, no violation would have occurred).

55. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966) (fifth amendment); *Brewer v. Williams*, 430 U.S. 387 (1977) (sixth amendment).

56. See, e.g., *United States v. Matlock*, 415 U.S. 164 (1974).

57. *Id.* at 169-72.

58. 110 S. Ct. 2793 (1990).

59. *Id.* at 2800.

60. *Id.* at 2801.

61. 110 S. Ct. 1632 (1990).

dardized.”⁶² In *Wells*, the police opened a locked suitcase found in the trunk. The police department had no regulations guiding the officer’s discretion in such matters. The Court held that an inventory without any guidelines gave too much discretion to police.⁶³ Guidelines clearly authorizing the opening of “all” containers, or “no” containers, or containers specifically described in the regulations would pass muster.⁶⁴ The Court suggested that some discretion on which containers to open may be left to the individual officer, and concluded with this language that threatens an exception to swallow the rule: It would be “equally permissible to allow . . . the opening of closed containers whose contents officers determine they are unable to ascertain from examining the container’s exteriors.”⁶⁵

6. *Stop and Frisk*.—In *Alabama v. White*,⁶⁶ the police received an anonymous tip that the defendant would leave her apartment at a particular time, enter a particular car, and drive to a particular motel carrying cocaine in the car. Police staked out her apartment, followed her as she drove the predicted route, and stopped her as she approached the motel. The state conceded that this was a *Terry* stop requiring “reasonable suspicion.”⁶⁷ The Court held that the anonymous tip, though insufficient to produce probable cause under *Illinois v. Gates*,⁶⁸ nevertheless produced reasonable suspicion for a *Terry* stop.⁶⁹

In *Molino v. State*,⁷⁰ the Indiana Supreme Court had occasion to examine the initial phase of a police-suspect encounter in an airport setting with a “drug-courier profile,” a recurrent situation that has deeply divided the United States Supreme Court.⁷¹ The defendant, an Hispanic male, carrying only a leather handbag, “quickly” deplaned in Indianapolis from a flight originating in Florida, did not claim luggage, visited the restroom, and walked quickly outside to hail a taxicab. At this point, three officers, who had been monitoring the defendant, approached him. One displayed his badge and identification card, identified himself as a narcotics investigator, and inquired if he could ask

62. See *Colorado v. Bertine*, 479 U.S. 367 (1987); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

63. *Wells*, 110 S. Ct. at 1635.

64. *Id.*

65. *Id.*

66. 110 S. Ct. 2412 (1990).

67. During the stop, the defendant consented to a search of the car that produced cocaine.

68. 462 U.S. 213 (1983).

69. *White*, 110 S. Ct. at 2415.

70. 546 N.E.2d 1216 (Ind. 1989).

71. See, e.g., *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980).

several questions, to which the defendant consented. The defendant showed his identification and airline ticket which were unremarkable, and stated that he was a clothing buyer. The officer then asked if he could look inside the handbag. The defendant indicated agreement. During this search, the defendant exhibited nervousness. When asked if the defendant would consent to a search of his person, he responded, "I have drugs."⁷² From this point on, the police followed all proper procedures. The defendant was convicted for possession of cocaine with intent to deliver.

The Indiana Supreme Court affirmed the conviction, 3-2, in an opinion written by Justice Givan.⁷³ The opinion leaves some doubt as to which of these two rationales is the decisive one: (a) the defendant had not been "seized" at the point he made the incriminating response; or (b) he had been "seized," but the seizure was proper under the stop-and-frisk doctrine. The Indiana Supreme Court cited *United States v. Mendenhall*,⁷⁴ a case remarkably similar on the facts, for the proposition that such questioning in an airport is not a seizure.⁷⁵ Only two justices, however, joined in that portion of the *Mendenhall* opinion, and later cases evidence a tendency of the United States Supreme Court to treat such confrontations as seizures.⁷⁶

Molino is more tractable to a "no seizure" solution than cases like *Florida v. Royer*⁷⁷ in which the defendant was escorted by airport police to an interrogation room. In *Molino*, the interrogation and searches took place on an airport sidewalk. Even so, it is difficult to imagine that someone who is approached as *Molino* was by the three narcotics officers would, in any objective sense, feel "free to go," which is the acknowledged test for lack of a seizure.⁷⁸ Indeed, when the police asked for his "consent" to a personal search, *Molino* responded, "I have drugs."⁷⁹ This does not sound like the response of someone who believes he is in a friendly conversation from which he can leave at will.

Molino can be more fairly interpreted as resting on a finding that there existed reasonable suspicion for the stop. The Indiana Supreme Court stated: "The police officers were merely in a 'stop and frisk' situation at the time appellant volunteered the information that he was carrying drugs."⁸⁰ The dissenting opinions of Justices DeBruler and

72. *Molino*, 546 N.E.2d at 1217.

73. *Id.* at 1219.

74. 446 U.S. 544 (1980).

75. *Molino*, 546 N.E.2d at 1220.

76. See, e.g., *United States v. Sokolow*, 109 S. Ct. 1581 (1989).

77. 460 U.S. 491 (1983).

78. See *United States v. Mendenhall*, 446 U.S. 544 (1980).

79. *Molino*, 546 N.E.2d at 1217.

80. *Id.* at 1219.

Dickson argue that the sparse facts of this case, even if they might be properly combined with other facts under a drug-courier profile, are simply not enough to produce reasonable suspicion.⁸¹

If the court based its decision on a finding of reasonable suspicion, recent United States Supreme Court decisions demonstrate the Court's willingness to find that reasonable suspicion is present on fewer facts than in the past. The facts in *United States v. Sokolow*⁸² are somewhat stronger than in *Molino*, and perhaps decisively so.⁸³ The finding of reasonable suspicion in *Sokolow* was not, as the *Molino* court intimated, *because* of the drug-courier profile, but *in spite* of it.⁸⁴ The primary difficulty with the *Molino* opinion is that it does not attempt to make a case for reasonable suspicion based on the facts before it. The opinion addresses primarily the "no seizure" issue and then the events that occur after the incriminating response which were not an issue in the case. In *Molino*, the Indiana Supreme Court gave little justification for its stated holding.

7. *Warrants*.—Indiana Code section 35-33-5-8 provides that affidavits in support of search or arrest warrants now may be forwarded to the judge by facsimile transmission (FAX), and that the warrants may be returned by similar transmission.⁸⁵ This provision undoubtedly will save valuable time in situations in which time is of the essence. One ponders whether this will lead courts in close cases to be more insistent on the use of warrants because warrants now will be obtainable with less delay.

8. *Drunk-Driving Roadblocks*.—In a long-awaited decision, the United States Supreme Court in *Michigan Department of State Police v. Sitz*,⁸⁶ upheld (6-3) police roadblocks to monitor drivers for driving under the influence.⁸⁷ The Court employed the administrative-search balancing process by weighing the government's "special need" against the privacy loss resulting from the particular intrusion involved.⁸⁸ Statistics and other evidence of the mayhem caused by drunk drivers were found to outweigh the relatively minimal intrusion involved in such stops.⁸⁹

81. *Id.* at 1220 (DeBruler, J., dissenting); *id.* at 1221 (Dickson, J., dissenting).

82. 109 S. Ct. 1581 (1989).

83. In *Sokolow*, the defendant paid \$2,100 for two round trip tickets from a roll of \$20 bills; he traveled under a name that did not match his telephone number; his original destination was Miami, where he stayed for only 48 hours; he appeared nervous; and he checked none of his luggage.

84. *Id.* at 1587.

85. IND. CODE § 35-33-5-8 (Supp. 1990).

86. 110 S. Ct. 2481 (1990).

87. *Id.* at 2488.

88. *Id.* at 2485.

89. *Id.* at 2486.

The Court addressed only the issue regarding the initial check of all drivers, and left questions concerning how much evidence justifies longer, more intrusive procedures for other cases.⁹⁰ Justice Stevens's dissent is intriguing. He would disallow random, unannounced roadblocks, but would permit regular, fixed, and anticipatable intrusions such as metal detectors at all subway entrances and breathalyzer checks at all toll-road entrances.⁹¹

9. *The Plain-View Doctrine.*—*Horton v. California*⁹² put to rest the mysterious “inadvertence” requirement of the plain-view doctrine⁹³ by holding 7-2 that the fourth amendment does not require “inadvertence” during plain-view searches.⁹⁴ Thus, if the police have probable cause that a house contains a gun and illegal drugs, and obtain a warrant specifying only the gun, any drugs found during the search will be admissible under the plain-view doctrine provided that (1) the police were looking only in places where the gun could be found, and that (2) the police had not yet found the gun.⁹⁵ The Court points out that police have little incentive to omit items from warrant applications because each listed item will expand and never contract the scope of the search.⁹⁶

B. Police Interrogation

The case of *Pennsylvania v. Muniz*⁹⁷ serves as a useful review of many well-established *Miranda* exceptions with only one new development. In *Muniz*, the defendant was arrested for drunk driving and was taken to the police station. He was asked a series of biographical questions (name, age, address, etc.) which he answered with slurred speech. The police videotaped a series of sobriety tests that the defendant failed miserably. The defendant was asked if he would take a breathalyzer test. He responded with a series of spontaneous admissions. When asked the calendar date of his sixth birthday, the defendant did not respond correctly. The defendant was not *Mirandized*.

The Supreme Court stated that the biographical questions, though conceded to be “custodial interrogation,” were exempt from *Miranda*

90. *Id.* at 2485.

91. *Id.* at 2497-98 (Stevens, J., dissenting).

92. 110 S. Ct. 2301 (1990).

93. This requirement, which states that under the plain-view doctrine, police may not seize those things they anticipated finding, stems from *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

94. *Horton*, 110 S. Ct. at 2304.

95. *Id.* at 2309.

96. *Id.* at 2304-10.

97. 110 S. Ct. 2638 (1990).

under the "routine booking question" exception.⁹⁸ The defendant's behavior and slurred speech were outside *Miranda* because they were not "testimonial" or "communicative," but were instead physical evidence of the defendant's body motion and speech similar to voice and handwriting exemplars which have been long understood to be outside the fifth amendment.⁹⁹ The spontaneous statements falling within what many courts call the "blurring out" doctrine were admissible because they were not the product of "custodial interrogation."¹⁰⁰ One of the more common misconceptions is that *Miranda* warnings are required in all arrests. The rule is only that such warnings must be given if custodial interrogation is to follow.¹⁰¹ All of these holdings are quite consistent with past cases.¹⁰²

In *Muniz*, the Court held, however, that the answer to the "sixth birthday" question should have been suppressed.¹⁰³ Even though the prosecution argued that it only wanted the answer to show slurred speech and impaired mental activity, the Court held that the "content" of the answer was implicated,¹⁰⁴ and thus the answer was excluded from the voice-handwriting exemplar exception.¹⁰⁵ This holding leaves some questions unresolved. What would the Court hold if the question called for some mental acuity, for example, adding three-digit numbers in the head, but did not involve any of the suspect's biographical history? Would this example just be a different kind of field sobriety test?

In *Illinois v. Perkins*,¹⁰⁶ police placed an undercover agent, posing as an inmate, in the defendant's cell. The agent encouraged the defendant to talk about the crime, and the defendant gave a series of incriminating responses.¹⁰⁷ The Court held that *Miranda* did not apply because the coercion with which *Miranda* is concerned was not involved.¹⁰⁸ Until the defendant thinks he is being interrogated by a policeman, the "inherent compulsion" is absent.¹⁰⁹ However, had formal judicial proceedings al-

98. *Id.* at 2650.

99. *Id.* at 2644-45. *See also* United States v. Wade, 388 U.S. 218 (1967) (suspect can be compelled to participate in a lineup).

100. *See* Rhode Island v. Innis, 446 U.S. 291 (1980).

101. *Miranda v. Arizona*, 384 U.S. 436, 477-79 (1966).

102. *See, e.g.,* New York v. Quarles, 467 U.S. 649 (1984); United States v. Dionisio, 410 U.S. 1 (1973).

103. *Muniz*, 110 S. Ct. at 2646.

104. *Id.*

105. *See* United States v. Dionisio, 410 U.S. 1 (1973) (voice exemplars); United States v. Mara, 410 U.S. 19 (1973) (handwriting exemplars).

106. 110 S. Ct. 2394 (1990).

107. *Miranda* warnings, of course, were not given as this tends seriously to undermine the ruse.

108. *Perkins*, 110 S. Ct. at 2397-98.

109. *Id.*

ready begun, the sixth amendment would have prohibited this police conduct.¹¹⁰ Once again, the Rehnquist Court takes a different view of the fifth amendment *Miranda* protection from its sixth amendment protection against custodial interrogation emanating from the assistance-of-counsel clause.

The Court previously has held that under both the fifth and sixth amendments, once a suspect invokes his right to counsel, interrogation must cease and may not begin again unless initiated by the suspect.¹¹¹ In *Michigan v. Harvey*,¹¹² the Court held 5-4 that statements taken in violation of this rule may be used, without offending either amendment, to impeach the trial testimony of a defendant provided that the statement is given voluntarily.¹¹³ The dissent pointed out, however, that under this case, after a suspect invokes counsel, there is little to deter police from continuing the interrogation because the defendant will rarely initiate further questions or cooperate after he has spoken with a lawyer.¹¹⁴ The rationale for the majority's decision, as in cases of using nonMirandized statements to impeach,¹¹⁵ is to discourage perjury.¹¹⁶

*James v. Illinois*¹¹⁷ is an intriguing case which produced a surprisingly close 5-4 vote with Justice Brennan voting with the majority. In *James*, the defendant was arrested for murder and attempted murder. The arrest, as conceded by the State, was illegal.¹¹⁸ The defendant, whose hair was short and black upon arrest, made the incriminating statement under police interrogation that his hair had been long and reddish-brown at the time of the incident and that he had cut it and dyed it to alter his appearance. Because this confession was the product of an unlawful arrest, the trial court suppressed it as fruit of the poisonous tree, a ruling that the State did not appeal. Under *Harris v. New York*,¹¹⁹ the statement nevertheless would have been available to impeach the defendant if he testified inconsistently.¹²⁰ Prosecution eyewitnesses testified that the perpetrator they identified at the trial had reddish-brown long hair. During the defendant's case-in-chief, the defendant called his close friend who testified that on the day of the shooting, the defendant's hair was short and black. The defendant's statement was then introduced

110. *United States v. Henry*, 447 U.S. 264 (1980).

111. *Edwards v. Arizona*, 451 U.S. 477 (1981).

112. 110 S. Ct. 1176 (1990).

113. *Id.* at 1179.

114. *Id.* at 1188 (Stevens, J., dissenting).

115. *See Harris v. New York*, 401 U.S. 222, 226 (1971).

116. *Harvey*, 110 S. Ct. at 1180.

117. 110 S. Ct. 648 (1990).

118. *Id.* at 650.

119. 401 U.S. 222 (1971).

120. *Id.* at 225.

by the prosecution solely to impeach the testimony of this witness. Conceding that the use of the defendant's statement to impeach the defendant's trial testimony, had he testified, would be proper under *Harris*, the Supreme Court held that the statement may not be used to impeach other defense witnesses.¹²¹ The Court reasoned that the risk of a perjury prosecution is a much more powerful deterrent to someone not already on trial for serious crime.¹²² The dissent asserted that *Harris* should be extended to embrace impeaching defense witnesses other than the defendant, especially those closely associated with the defendant, to deter the defendant from maneuvering his way around *Harris*.¹²³

Although both the majority and the dissent addressed the question in only a cursory way, classic understanding of evidence is that the refutation of one's statement with that of another is not, strictly speaking, sincerity impeachment.¹²⁴ If one person asserts mutually inconsistent statements, his credibility is *necessarily* called into question. If A says "red" at one time and "not red" at another, he *cannot* be telling the truth all the time. If, however, A says "red" and B says "not red," they cannot both be right, but one cannot determine whose credibility is necessarily called into question.

C. Discovery

In Indiana, discovery rights were expanded in *Hicks v. State*¹²⁵ to permit pretrial discovery of verbatim witness statements notwithstanding the claim that such statements were work product.¹²⁶ This holding overrules *Spears v. State*.¹²⁷ The primary rationale offered by the *Hicks* court to support the ruling was that verbatim witness statements must be viewed as potential substantive evidence under the rule of *Patterson v. State*.¹²⁸ Pursuing this logic, the court analogized verbatim witness statements to other exhibits such as photographs, videotapes, handwriting examples, diagrams, and other physical evidence; the discoverability of such similar physical evidence is unquestioned, even if prepared by counsel.¹²⁹ The court perceived that discovery of these statements, like

121. *James*, 110 S. Ct. at 652, 656.

122. *Id.* at 653.

123. *Id.* at 658 (Kennedy, J., dissenting).

124. E. CLEARY, MCCORMICK ON EVIDENCE § 47 (3d ed. 1984).

125. 544 N.E.2d 500 (Ind. 1989).

126. *Id.* at 504.

127. *Id.* See *Spears v. State*, 272 Ind. 647, 403 N.E.2d 828 (1980).

128. *Hicks*, 544 N.E.2d at 504. See *Patterson v. State*, 263 Ind. 55, 324 N.E.2d 482 (1975) (court permits the substantive use of prior statements of a witness who testifies and is available for cross-examination).

129. *Hicks*, 544 N.E.2d at 504.

discovery of other physical evidence, would improve the efficiency of the criminal justice system.¹³⁰ The culmination of this reasoning was the rejection of the work product doctrine as a shield to discovery.¹³¹ The court appeared to question whether such statements are protectable work product by observing that the "essential function of the work product exception is to protect from disclosure an attorney's 'mental impressions, conclusions, opinions or legal theories.'"¹³² The court probably does not believe that a verbatim witness statement falls within this definition.

The distinction between the two rationales is important. If *Hicks* means that such statements are work product, but discoverable, because the statement may be offered as substantive evidence under *Patterson*,¹³³ the parties' failure to designate the declarant of the statement as a potential witness could thwart pretrial discovery of the statement. This would result because submission of the statement as substantive evidence under *Patterson* would require the declarant to testify at trial.¹³⁴ If the declarant does not testify, the statement could not be admitted as substantive evidence.¹³⁵ Alternatively, if these statements are not work product, the ability to discover such statements would not be affected by the party's designation of potential witnesses.¹³⁶

The breadth of the *Hicks* rule was demonstrated in *Crawford v. Superior Court of Lake County*.¹³⁷ In *Crawford*, the trial court directed

130. *Id.*

131. *Id.*

132. *Id.* (quoting Trial Rule IND. R. TRIAL P. 26(B)(3) (1990).

133. 263 Ind. 55, 324 N.E.2d 482 (1975).

134. *Id.* at 58, 324 N.E.2d at 484.

135. See *Watkins v. State*, 446 N.E.2d 949 (Ind. 1983).

136. Verbatim witness statements should be discoverable without regard to whether the State intends to call the relator-witness. The purpose of discovery is to promote truth-finding; it is not limited to determining the nature of the adversary's case. Moreover, a prosecutor is not a typical adversary. The prosecutor will have more resources available for preparation than will the ordinary defendant. A prosecutor is also atypical in that prosecutors are charged, in theory, with obtaining a fair result. Truth-finding and the likelihood of a fair result are enhanced if the stronger adversary, the prosecutor, is obligated to tender all relevant evidence.

137. 549 N.E.2d 374 (Ind. 1990). *Crawford* sheds some light on the exact basis of the earlier *Hicks* holding. The court in *Crawford* noted that the State's act of listing potential witnesses was a sufficient basis for assuming the witnesses would testify and that their prior statements would be relevant. *Id.* at 375-76. This analysis is necessary only if *Hicks* is predicated on the assumption that witnesses' statements are work product but are not protected because they may become substantive evidence if the witness testifies. Nevertheless, doubt remains because the trial court order that was affirmed in *Crawford* directed the State to produce all "statements by witnesses to police officers . . ." *Id.* at 375. The opinion does not suggest that this particular order was confined to the statements of witnesses that the State intended to call at trial, although the trial court's first discovery order was so limited. *Id.* at 376.

the State to produce statements made by witnesses to police officers which had been reduced to writing in police reports.¹³⁸ The State objected on the ground that police reports are protected work product under *State ex rel. Keaton v. Circuit Court of Rush County*.¹³⁹ The court rejected the argument, and ruled that statements which purport to be the words of the witness reduced to writing as the witness spoke or shortly thereafter are discoverable even if they are contained in a police report.¹⁴⁰ If a police officer's opinions, impressions, and theories are interspersed with witness statements, an in-camera inspection by the trial court should be utilized to determine whether the document is essentially a witness statement or a privileged report.¹⁴¹

A trial court's failure to conduct an in-camera review required reversal in *Hulett v. State*.¹⁴² Hulett was charged with child molesting. Prior to the alleged incident, the child had received counseling in relation to her parents' divorce. The defendant sought discovery of the counselor's file of the child. The trial court initially indicated it would conduct an in-camera review, but failed to do so. Thereafter, the trial court ruled that the file was not discoverable on the grounds that the material was privileged and irrelevant, and that its tender would be oppressive and burdensome.¹⁴³ The child testified at trial, and Hulett was convicted.

The court of appeals declined to create a general counselor-patient privilege, and found that the file was unprotected in this regard.¹⁴⁴ The court also found that any ruling on relevancy was speculative because only the counselor knew the contents of the file.¹⁴⁵ Because the file could contain evidence of prior false accusations or inconsistent statements bearing on the credibility of the testifying child, an in-camera inspection by the trial court was required.¹⁴⁶ Without such an inspection, the presence or absence of discoverable information could not be ascertained. Thus, failure to conduct an in-camera inspection was reversible error.

138. *Crawford*, 549 N.E.2d at 375.

139. *Id.* at 376. See *State ex rel. Keaton v. Circuit Court of Rush County*, 475 N.E.2d 1146 (Ind. 1985).

140. *Crawford*, 544 N.E.2d at 376.

141. *Id.*

142. 552 N.E.2d 47 (Ind. Ct. App. 1990).

143. *Id.* at 48.

144. *Id.* at 49.

145. *Id.*

146. *Id.* The claim that tendering the file was unduly burdensome because of the need to excise references to individuals other than the child was deemed to relate more to the relevancy inquiry than to the claim of burdensomeness. *Id.* at 50. The claim that the request was burdensome was only addressed in this context.

D. Double Jeopardy

The United States Supreme Court decided two double jeopardy cases last term. Each is surprising, important, and likely to prompt a flood of cases in refinement.

The first, *Grady v. Corbin*,¹⁴⁷ is arguably the year's blockbuster for the practicing criminal justice professional. Justice Brennan wrote for the majority in this 5-4 decision; thus, its longevity is in serious question. After an automobile collision, the defendant was ticketed for driving under the influence (D.U.I.) and for crossing the center line, which are crimes under New York state law. An occupant in the other car died shortly thereafter. Through tragic noncommunication, the prosecutors working on the traffic tickets were unaware of the fatality and the pendency of a homicide prosecution. The defendant pleaded guilty to D.U.I. and crossing the center line, and then sought to prohibit his prosecution for "reckless manslaughter" on double-jeopardy grounds.¹⁴⁸ The bill of particulars in the homicide prosecution showed that the prosecution would attempt to prove recklessness through (1) D.U.I., (2) crossing the center line, and (3) driving too fast for conditions. The Court held that the reckless manslaughter prosecution was barred unless the prosecutor first amended the bill of particulars to rely solely upon driving too fast for conditions.¹⁴⁹ The prosecutor cannot, in any retrial, attempt to prove conduct that is either D.U.I. or crossing the center line.¹⁵⁰

This decision marks a radical departure from existing doctrine. The Supreme Court in *Blockburger v. United States*¹⁵¹ held that offenses are not the "same" for double-jeopardy purposes if each requires proof of a material element that the other does not.¹⁵² Thus, if offenses are identical or one is a lesser-included offense of the other, conviction for both is improper. Clearly, the prosecution in this case is not barred by *Blockburger* because D.U.I. and crossing the center line can be committed without a death ensuing and involuntary manslaughter can occur without the commission of these particular traffic offenses.

Likewise, if the government had lost on a factual element common to the second case, the "collateral estoppel" extension of double jeopardy

147. 110 S. Ct. 2084 (1990).

148. *Id.* at 2086. The New York reckless manslaughter statute is equivalent to Indiana's reckless homicide statute. IND. CODE § 35-42-1-5 (1988).

149. *Grady*, 110 S. Ct. at 2086.

150. *Id.* at 2094.

151. 284 U.S. 299 (1932).

152. *Id.* at 304.

would bar the second trial.¹⁵³ In the case at bar, however, the government won the earlier case.

The Court, in a striking extension of the reach of the double jeopardy clause, adopted dicta in *Illinois v. Vitale*,¹⁵⁴ and held as follows:

As we suggested in *Vitale*, the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the state will prove, not the evidence the State will use to prove that conduct.¹⁵⁵

Note that the homicide prosecution is not based on a theory that the killing was committed during the perpetration of an unlawful act, a theory which would require the State to prove the unlawful act as an essential element of the current charge.¹⁵⁶ Such would be parallel to convicting the defendant first for arson and then prosecuting the defendant for felony murder based on arson, a scenario clearly barred under *Harris v. Oklahoma*.¹⁵⁷ The homicide theory in *Grady* was recklessness, not unlawful act; recklessness may occasion the proof of unlawful acts such as D.U.I., but it does not require it.¹⁵⁸ These acts of recklessness happen to be crimes themselves, but the theory of recklessness does not require proof that the underlying activity is an independent crime.¹⁵⁹ For these reasons, the *Grady* holding extended double jeopardy protection well beyond its previous boundaries.

The *Grady* court's holding does not quite extend double jeopardy to embrace the civil notion of compulsory joinder, but it has moved a great distance in that direction. Until this decision is given more definition, prosecutors must be vigilant not to permit any charges to go to trial or plea if any part of the conduct covered thereby will form part of the factual content of any subsequent criminal proceeding.¹⁶⁰

153. *Ashe v. Swenson*, 397 U.S. 436 (1970).

154. 447 U.S. 410 (1980).

155. *Grady*, 110 S. Ct. at 2093.

156. This would be the case in Indiana if prosecution were brought under Involuntary Manslaughter, IND. CODE § 35-42-1-4 (1988), but not true under Reckless Homicide, IND. CODE § 35-42-1-5 (1988).

157. 433 U.S. 682 (1977).

158. *Grady*, 110 S. Ct. at 2094.

159. See IND. CODE § 35-42-1-5 (1988).

160. Prosecutors will have to be careful that proof in any trial will not foreclose an opportunity to try other charges arising out of the same conduct, whether currently charged or not. Fear of a *Grady* foreclosure of later prosecutions may amount to a *de facto* compulsory joinder regime. If the defendant successfully moves for a severance of counts, presumably this will constitute a waiver of the *Grady* protection.

The other 1989 Supreme Court double jeopardy decision was *Dowling v. United States*.¹⁶¹ In *Dowling*, the defendant was tried for the first robbery (Robbery 1) and acquitted. The defendant was then tried for the second robbery (Robbery 2). At the second trial, the Government called a witness to identify the defendant as the perpetrator of Robbery 1, an identification the Court assumed would otherwise fit under the Federal Rule of Evidence 404(b) exception to character evidence.¹⁶² The defendant conceded admissibility under Rule 404(b), but claimed that any reference to his identity in Robbery 1 was barred by double jeopardy because it would force him, in effect, to relitigate issues on which he had already prevailed.¹⁶³ The Court held 6-3 that there was no constitutional violation, and that this identification testimony was admissible.¹⁶⁴ Relying on a subtle distinction in the applicable burdens of proof, the Court noted that the first trial demonstrated only that the defendant was not identified as the perpetrator in Robbery 1 *beyond a reasonable doubt*.¹⁶⁵ The standard for Rule 404(b) evidence of other crimes, however, is only a *preponderance of the evidence* under *Huddleston v. United States*.¹⁶⁶ Because the Robbery 2 trial court found by a preponderance that the defendant committed Robbery 1, the prior acquittal did not bar the testimony.¹⁶⁷ Thus, past specific instances of misconduct that have been litigated to acquittal stand on the same footing as those that have not yet been litigated. If the prosecution can persuade the trial court by a preponderance of the evidence that such crimes occurred, they are admissible if they fit the Rule 404(b) exception to character evidence.¹⁶⁸

The dissent raised an interesting question: If the standard of proof for sentencing purposes of past misconduct including crimes is less than beyond a reasonable doubt as it typically is, could a prior acquittal be used to enhance a sentence?¹⁶⁹ There are Indiana cases to the contrary,¹⁷⁰ but they are prior to *Dowling*.¹⁷¹

161. 110 S. Ct. 668 (1990).

162. Indiana courts recognize the 404(b) exception to character evidence. See 12 R. MILLER, INDIANA EVIDENCE 265-94 (1984), which describes the admissibility of prior acts to prove intent, motive, knowledge, malice, sanity, scheme or plan, capacity to commit offense, identity, and depraved sexual instinct.

163. *Dowling*, 110 S. Ct. at 672.

164. *Id.* at 675.

165. *Id.* at 672-73.

166. 485 U.S. 681 (1988).

167. *Dowling*, 110 S. Ct. at 673.

168. *Id.*

169. *Id.* at 680 (Brennen, J., dissenting).

170. See, e.g., *McNew v. State*, 271 Ind. 214, 391 N.E.2d 607 (1979).

171. See *infra* § III(H).

In *Tyson v. State*,¹⁷² the Fourth District Court of Appeals confronted a vexing manifest-necessity scenario.¹⁷³ The defendant's trial for burglary and theft had commenced (hence, jeopardy had attached), and unexpectedly a critical prosecution witness who was under subpoena vanished. The prosecution moved for a mistrial, which the court granted over the defendant's objection. The defendant was convicted at a subsequent trial after having properly preserved his double jeopardy challenge.¹⁷⁴

The question presented was whether the absence of the witness was "manifest necessity" so as to permit a second trial after a mistrial of the first.¹⁷⁵ The majority held that it was not manifest necessity because once having subjected defendant to jeopardy, the state was bound to see the case to conclusion even if its witnesses became unavailable.¹⁷⁶ The dissent, while recognizing that the majority's position would be true as a general rule, noted that the combination of the following factors should have led to a different result in this case: (1) the witness had been served with subpoena; (2) the witness drove the getaway car; (3) the witness was the only one who saw the defendant at scene; (4) the witness had an ongoing friendship with the defendant; and (5) this friendship appeared to be the reason for her absconding.¹⁷⁷ Thus, the dissent argued, applying the double jeopardy bar in this case placed an unfair burden on the State.¹⁷⁸

This issue is a difficult one. It seems harsh to charge either the prosecution or the defendant with the witness's absconding in the absence of proof of connivance. Presumably, if the State could show that the defendant participated in the disappearance, no constitutional violation could be shown.¹⁷⁹ Nor will it ordinarily be clear that a mistrial will help the prosecution; after all, if the witness runs away out of friendship for the defendant, why should one assume that, once discovered, her testimony will be what the State hopes?¹⁸⁰ In the first trial, the prosecution

172. 543 N.E.2d 415 (Ind. Ct. App. 1989).

173. "Manifest necessity" is a doctrine permitting retrial after a mistrial caused through no egregious fault of the prosecution. See IND. CODE § 35-41-4-3 (1988).

174. The appellate record does not indicate whether this critical witness testified at the second trial, a rather astounding omission.

175. The manifest necessity exception to double jeopardy is codified in IND. CODE § 35-41-4-3 (1988).

176. *Tyson*, 543 N.E.2d at 419-20.

177. *Id.* at 420 (Chezum, J., dissenting).

178. *Id.*

179. *Id.*

180. Of course, in this case, the appellate court addressed the question *after* the second trial, though the record does not tell the reader whether the absent witness testified and, if so, how. Ordinarily, however, double-jeopardy challenges *precede* the second trial because being forced to undergo the second trial is part of what the clause protects against.

had called other witnesses and presumably could have let the case proceed to jury determination. The majority's fear was that prosecutors will begin to use "manifest necessity" when their evidence is not evolving as strongly as it might in a later trial.¹⁸¹ If the missing witness cannot be shown to be critically important, this fear becomes more realistic.

E. Confrontation

The United States Supreme Court decided two confrontation cases last term, each arising from the tension between the defendant's sixth amendment confrontation interests, the cross-examination interest and the face-to-face interest, and the state's need for the testimony of minor children in sexual abuse cases. The Court rejected an attempt to introduce a child's hearsay statement through a relator, thus maintaining the strength of the cross-examination interest,¹⁸² but permitted cross-examined testimony of a child witness separated from the courtroom, thus weakening the face-to-face interest.¹⁸³

In *Idaho v. Wright*,¹⁸⁴ the trial court permitted a physician to relate the statements of a two-and-a-half-year-old child. It had been determined that the child could not possibly give meaningful testimony at trial.¹⁸⁵ Though conceding that the testimony included hearsay, the trial court found that the child's statement bore sufficient indicia of reliability to fit the Idaho "residual" or "catch-all" exception, the functional equivalent of Federal Rule of Evidence 803 (24),¹⁸⁶ and therefore rejected the defendant's confrontation claim.

The Supreme Court began by assuming that the child was unavailable, thus paving the way for a hearsay admission, but held that under the confrontation clause, indicia of reliability were insufficient to admit the evidence.¹⁸⁷ Indeed, as the Court noted, there are many reasons to be

181. *Tyson*, 543 N.E.2d at 419.

182. *Idaho v. Wright*, 110 S. Ct. 3139 (1990).

183. *Maryland v. Craig*, 110 S. Ct. 3157 (1990).

184. 110 S. Ct. 3139 (1990).

185. *Id.* at 3141.

186. The drafters of the Federal Rules of Evidence noted that the historical development of hearsay exceptions was often frustrated by cases in which everyone appreciated the high trustworthiness of given hearsay, but could not fit it within an existing "pigeonhole." Often, to admit the evidence, courts would expand the most appropriate pigeonhole. Over time, this had the effect of creating exceptions that would accommodate hearsay that was not at all trustworthy. "Hard cases make bad law." To avoid a repeat of this process, the drafters inserted a "residual" exception to hearsay. *See* FED. R. EVID. 803(24) and 804(b)(5). Under these rubrics, the court can admit highly trustworthy hearsay without destroying the integrity of the other historical exceptions.

187. *Wright*, 110 S. Ct. at 3152.

particularly suspicious of these statements in sexual abuse cases.¹⁸⁸ Thus, the Court affirmed the state supreme court's reversal of the conviction.¹⁸⁹ The opinion reaffirmed that if a statement fits a "firmly rooted" exception to the hearsay rule, it will pass muster under the confrontation clause.¹⁹⁰ However, cases under the "residual" exception must be monitored on a case-by-case basis for sufficient indicia of reliability to meet a confrontation challenge.¹⁹¹

*Maryland v. Craig*¹⁹² began the refinement of the face-to-face protection of *Coy v. Iowa*.¹⁹³ If the trial court determines, in an individual case, that testimony in the courtroom will cause a child witness to suffer serious emotional distress such that the child cannot reasonably communicate, the trial court may arrange a closed-circuit process that separates the child from the courtroom.¹⁹⁴ *Craig* suggests that the method used in this case is permissible, though other methods may also be permissible.¹⁹⁵ Here the witness, prosecutor, and defense counsel were in a separate room, all viewable by judge, jury, and defendant, and the defendant was in direct audio contact with his attorney. The child could not see the defendant or others in the courtroom. The Supreme Court pointed out that there had been a particularized holding by the trial court that the child's view of the defendant would have caused trauma. If, however, a trial court should find that the problem is not the presence of the defendant, but rather the general courtroom setting, the defendant should join the others in the separate room to give the fullest protection to the defendant's face-to-face interest.¹⁹⁶

The Indiana Court of Appeals for the First District had occasion to review the "face-to-face" aspect of confrontation in *Casada v. State*.¹⁹⁷ Defendant, the step-father of the alleged victim, E.T., was convicted of two counts of attempted child molesting, a class C felony.¹⁹⁸ At the trial, thirteen-year-old E.T.¹⁹⁹ became so distraught on the stand that she could not respond to the first question asked on direct examination by the prosecution. After a short recess, the trial court ordered a six-foot by four-foot chalkboard to be placed between the witness and the

188. *Id.* at 3151.

189. *Id.* at 3153.

190. *See* United States v. Inadi, 475 U.S. 387 (1986).

191. *Wright*, 110 S. Ct. at 3152.

192. 110 S. Ct. 3157 (1990).

193. 487 U.S. 1012 (1988).

194. *Craig*, 110 S. Ct. at 3170.

195. *Id.* at 3167-68.

196. *Id.* at 3169.

197. 544 N.E.2d 189 (Ind. Ct. App. 1989).

198. IND. CODE § 35-42-4-3(c) (1988).

199. She was 12 years old at the time of the alleged incident.

defendant in an attempt to decrease the witness's anxiety. She was then able to give testimony; indeed, the chalkboard was removed during cross and redirect examination.

In a carefully reasoned opinion, Judge Ratliff first reviewed the history of the confrontation clauses of the United States and Indiana constitutions with particular attention to the recently re-emerging emphasis on face-to-face viewing.²⁰⁰ The opinion notes that for witnesses under ten years of age, the legislature has provided some guidance in this area.²⁰¹ These provisions did not apply to the case at bar due to the witness's age. In any event, the statutes were not intended as the exclusive word on the subject, and a trial court is free to fashion other remedies to balance the government's legitimate interests (including the development of testimony) against the defendant's interests in a face-to-face encounter.²⁰² The core of the holding is that a witness's mere nervousness or temporary inability to testify is not, without further inquiry, sufficient to overcome the defendant's strong constitutional interests.²⁰³ A chalkboard or other suitable barrier can, in an appropriate case, be a permissible technique; however, the trial court in this case had examined no witnesses to determine if the witness would or would not be able to reasonably communicate without such apparatus. Either further inquiry or less drastic means, such as a recess to permit the witness to collect composure, should have preceded the use of the barrier.²⁰⁴

F. Scientific Evidence

Although this Article does not embrace the discipline of "evidence," no criminal law survey could be complete without noting that Indiana has joined the growing list of states that have, by statute, accepted forensic DNA²⁰⁵ analysis as sufficiently scientific for use in court.²⁰⁶

G. Trial

1. Jury Selection.—During his state court trial, a white defendant objected to the prosecutor's use of two peremptory challenges to strike

200. *Casada*, 544 N.E.2d at 189. *See also* *Coy v. Iowa*, 108 S. Ct. 2798 (1988) (the leading case on the sixth-amendment application); *Miller v. State*, 531 N.E.2d 466 (1988) (the leading case on article I, section 13 of the Indiana Constitution).

201. IND. CODE §§ 35-37-4-6 and 35-37-4-8 (1988 & Supp. 1990).

202. *Casada*, 544 N.E.2d at 196.

203. *Id.*

204. *Id.*

205. Deoxyribonucleic Acid.

206. IND. CODE § 35-37-4-10 (Supp. 1990).

the only two blacks on the venire panel from the petit jury. In *Holland v. Illinois*,²⁰⁷ Holland, the defendant, preserved both the sixth amendment fair cross-section claim and the equal protection claim in the Illinois state courts. Unfortunately, Holland pursued only the fair cross-section claim before the United States Supreme Court.

Because every defendant has a sixth amendment right to a venire designed to provide a fair cross-section of the community, the Court concluded that Holland had standing to raise the sixth amendment claim even though he was not a member of a systematically excluded group.²⁰⁸ Nevertheless, the Court rejected the claim on the merits. The Court adhered to its ruling in *Lockhard v. McCree*²⁰⁹ that the fair cross-section requirement applies only to the venire panel and not to the petit jury.²¹⁰ The fair cross-section requirement was viewed as a means of assuring an impartial jury, not a representative jury.²¹¹ To this end, the fair cross-section requires that the venire stage can be disrupted at the petit jury stage to serve the State's legitimate interest in obtaining an impartial jury.²¹² The State, therefore, may use peremptory challenges to eliminate jurors belonging to groups it believes would unduly favor the other side.

The fair cross-section requirement of the sixth amendment is not offended by such conduct even if the strikes are based on racial groupings because (1) the fair cross-section requirement applies to the venire panel and not to petit juries and (2) disrupting the cross-section provided by the venire is often necessary to secure an impartial jury.²¹³ Indeed, the Court indicated that the sixth amendment right to an impartial jury would be impaired, if not lost, by any rule requiring that the petit jury reflect a fair cross-section of the community.²¹⁴ *Holland v. Illinois* explicitly holds that although use of peremptory challenges based on race may violate the equal protection clause, it does not violate the sixth amendment's fair cross-section requirement.²¹⁵

The more interesting aspect of *Holland* is Justice Kennedy's concurring opinion in the 5-4 decision. Justice Kennedy noted that the decision does not alter the rule that exclusion of jurors, based on race, violates the equal protection clause.²¹⁶ Justice Kennedy also stated that

207. 110 S. Ct. 803 (1990).

208. *Id.* at 805.

209. 476 U.S. 162 (1986).

210. *Holland*, 110 S. Ct. at 806 (citing *Lockhard v. McCree*, 476 U.S. 162, 174 (1986)).

211. *Id.* at 807.

212. *Id.* at 809.

213. *Id.* at 808.

214. *Id.*

215. *Id.* at 806.

216. *Id.* at 811 (Kennedy, J., concurring) (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

a white defendant would have standing to raise the claim.²¹⁷ Coupled with the four dissenters, Justice Kennedy would have been the fifth vote to find the equal protection claim available to any defendant. Thus, Holland would have been deemed to have standing on the equal protection claim had he pursued it. However, because one of the dissenters, Justice Brennan, has retired, the ultimate resolution of this particular standing question remains unclear.

The language in *Holland* regarding standing on the equal protection claim raises questions regarding the viability of the Indiana case law dealing with *Batson* issues. *Batson* issues also were addressed most recently by the Indiana Supreme Court in *Minniefield v. State*.²¹⁸ In *Minniefield*, two black defendants were tried on robbery charges. The State's evidence included a slip of paper taken from the victim's pocket which was recovered during a search of one of the defendants. Racist jokes were written on the paper. It appeared that the source of the racist jokes was the victim. As a matter of strategy, the State used six peremptory challenges to strike one white and five black prospective jurors, leaving a petit jury of one black and eleven white persons. The defense objected based on *Batson v. Kentucky*.²¹⁹

On appeal to the Indiana Supreme Court, the convictions were reversed.²²⁰ The court ruled that to establish a denial of equal protection, a defendant must show the following: (1) He is a member of a cognizable racial group; (2) the prosecutor peremptorily challenged members of the defendant's race; and (3) the circumstances raise an inference that the prosecutor excluded veniremen because of their race.²²¹ Once a defendant demonstrates as much, the State must provide a neutral explanation.²²²

In *Minniefield*, the defendants clearly offered circumstances that raised the inference that the prosecution excluded jurors based on race. The Indiana Supreme Court rejected strategic grounds as a neutral explanation.²²³ Likewise, the court rejected the State's claim that the challenges were not based on the jurors' "racial" identity with the defendant.²²⁴ The majority found that the use of peremptory challenges based on race is a per se violation of the equal protection clause.²²⁵

217. *Id.* at 811-12 (Kennedy, J., concurring).

218. 539 N.E.2d 464 (Ind. 1989). *Minniefield* was discussed in last year's survey article. See Kammen & Polito, *Criminal Law and Procedure, Survey of Recent Developments in Indiana Law*, 22 IND. L. REV. 303 (1990).

219. 476 U.S. 79 (1986).

220. *Minniefield*, 539 N.E.2d at 467.

221. *Id.* at 466.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

The viability of the *Minniefield* requirement that the challenged jurors be members of the defendant's race is questionable. Again, the *Holland* opinion demonstrated the existence of five votes that would hold that all defendants have standing to challenge the exclusion of jurors based on race on equal protection grounds.²²⁶ Four members of the majority in *Holland* did not express their views on the issue. At worst, Justice Brennan's retirement means the vote would be 4-4 leaving the Court's newest member, Justice Souter, in the tie-breaker position. Accordingly, all defendants should preserve the *Batson* issue if it arises during jury selection, notwithstanding the *Minniefield* requirement that the defendant and the challenged jurors be members of the same racial group.

2. *Waiver*.—According to the Indiana Court of Appeals decision in *Phillips v. State*,²²⁷ forfeiture of the right to be present for trial requires sufficient evidence to support a finding that the waiver was knowing and intelligent.²²⁸ Phillips, a Missouri attorney, proceeded pro se. The record was unclear about whether Phillips had received notice of pretrial and trial dates. When Phillips called the prosecutor to ascertain the trial date, he was advised that the trial had occurred a few days earlier. Not surprisingly, Phillips had lost.

On appeal, the court held that the right to be present at trial is fundamental to a fair trial.²²⁹ As a consequence, waiver of the right would be controlled by the standard of *Johnson v. Zerbst*.²³⁰ A finding of waiver must be supported by evidence sufficient to show an intentional relinquishment of a known right.²³¹ A statement by the court reporter that notice of the trial date would have been mailed to the defendant is insufficient to support such a finding.²³² Evidence sufficient to meet the standard should demonstrate that the defendant knew of the trial date and, by his absence, intended to avoid trial.²³³

3. *Instructions*.—In the Indiana Supreme Court decision of *Madden v. State*,²³⁴ the trial court had instructed the jury that "[i]t is not essential in this cause that the testimony of the prosecuting witness be corroborated by other evidence. It is sufficient if, from all the evidence, you believe beyond a reasonable doubt that the crimes were committed by the Defendant as alleged."²³⁵ Madden, the defendant, objected on the ground

226. *Holland*, 110 S. Ct. at 813 (Marshall, J., dissenting).

227. 543 N.E.2d 646 (Ind. Ct. App. 1989).

228. *Id.* at 648.

229. *Id.*

230. 304 U.S. 458 (1938).

231. *Phillips*, 543 N.E.2d at 648.

232. *Id.*

233. *Id.* at 649.

234. 549 N.E.2d 1030 (Ind. 1990).

235. *Id.* at 1033.

that the instruction over-emphasized the victim's testimony. On appeal, the majority recognized that when more than one witness testifies, it is improper for a trial court to comment on or emphasize a particular witness's testimony.²³⁶ Nevertheless, the majority concluded that because only the victim had testified regarding identification of the accused and the acts he had perpetrated on her,²³⁷ and because her testimony need not be corroborated, the instruction was appropriate.²³⁸

In his dissent, Justice DeBruler provided a powerful condemnation of the instruction. The rule suggesting that a conviction may rest on the uncorroborated testimony of the victim is an appellate standard of review, not a standard to be applied by the trier of fact.²³⁹ Justice DeBruler also noted that lack of corroboration is a legitimate element for the trier of fact to consider in determining the credibility of witnesses and the weight to be accorded to such testimony.²⁴⁰ The instruction, however, strongly suggested that the jury should not consider the lack of corroboration as it affects the witness's credibility or the weight of the testimony. Last, a general instruction on credibility and weight, applicable to all testimony, could include an explanation regarding corroboration to provide a balanced and fair instruction. Given all this, Justice DeBruler would have found that the challenged instruction was improper because it called special and specific attention to an individual witness, namely the State's key witness.²⁴¹

In another jury instruction case, *Pinegar v. State*,²⁴² the Indiana Court of Appeals found that the defenses of heat of passion and self-defense are not inherently inconsistent.²⁴³ If there is evidence to support each defense, both should be submitted to the jury. *Pinegar* was a homicide case in which the evidence demonstrated that the victim sought the confrontation and struck the first blow. The trial court instructed on self-defense, but refused to instruct on voluntary manslaughter, that is, murder mitigated by sudden heat. The court of appeals rejected the State's assertion that dicta in *Ward v. State*²⁴⁴ compelled the conclusion

236. *Id.*

237. The significance of this statement is unclear. That an individual witness is the only witness on a particular point is the norm in multiwitness trials. Trials in which all witnesses testify on all issues are atypical. Focusing special attention on the testimony of a single witness has been previously condemned, as Justice DeBruler observed in *Hackett v. State*, 266 Ind. 103, 360 N.E.2d 1000 (1977).

238. *Madden*, 549 N.E.2d at 1033.

239. *Id.* at 1035 (DeBruler, J., dissenting).

240. *Id.*

241. *Id.* at 1036.

242. 553 N.E.2d 525 (Ind. Ct. App. 1990).

243. *Id.* at 528.

244. 519 N.E.2d 561 (Ind. 1988).

that killing in sudden heat was inherently inconsistent with self-defense.²⁴⁵ The Indiana Supreme Court stated that the particular facts of *Ward* presented a self-defense, not a sudden heat, question.²⁴⁶ The Court of Appeals found the language restricted to the facts of *Ward*.²⁴⁷ Both defenses can admit the existence of the crime of murder, which is the knowing or intentional killing of another human being.²⁴⁸ Self-defense offers a complete defense, that is, the knowing and intentional killing was justified because the use of deadly force was necessary to prevent serious bodily injury to oneself or others.²⁴⁹ Heat of passion offers a partial defense; that is, the knowing or intentional killing occurred while acting under the sudden heat of passion.²⁵⁰

When the accused is actually provoked and responds, self-defense and sudden heat both may be appropriate. The jury, not the court, should determine whether the force utilized was reasonable (self-defense), or whether the force was excessive, but utilized in the sudden heat generated by the initial attack (voluntary manslaughter).²⁵¹ Thus, if the facts warrant, the trial court should charge the jury on both defenses.

H. Guilty Pleas

The Indiana Supreme Court retreated from yet another aspect of previously fixed rules pertaining to guilty pleas, as originally set forth in *German v. State*.²⁵² In *German*, the court held that a trial judge must personally inform the defendant of all the rights, among other things, forfeited by a guilty plea.²⁵³ Failure to do so would require reversal.²⁵⁴ In *White v. State*,²⁵⁵ the Indiana Supreme Court limited the *German* rule, and held that only the trial court's failure to inform the defendant of the right to a jury trial, the right of confrontation, or the right against self-incrimination requires automatic reversal.²⁵⁶ Other omissions must be coupled with a showing that the omission actually rendered the plea involuntary or unintelligent.²⁵⁷

245. *Pinegar*, 533 N.E.2d at 528.

246. *Ward*, 519 N.E.2d at 563.

247. *Id.*

248. IND. CODE § 35-42-1-1 (1988 & Supp. 1990).

249. *Id.* § 35-41-3-2 (1988).

250. *Id.* § 35-42-1-3.

251. *Pinegar*, 533 N.E.2d at 528.

252. 428 N.E.2d 234 (Ind. 1981).

253. *Id.* at 236.

254. *Id.* at 237.

255. 497 N.E.2d 893 (Ind. 1986).

256. *Id.* at 905-06.

257. *Id.* at 901.

In *Youngblood v. State*,²⁵⁸ the supreme court, without reference to *German*, ruled that a guilty plea record devoid of any personal advisement by the trial court may be rehabilitated by the later presentation of evidence.²⁵⁹ The court rejected the existence of any right to an advisement by the trial court.²⁶⁰ The defense counsel's postconviction testimony that the defendant was advised of his rights by counsel was sufficient to establish that the original plea was voluntary and intelligent.²⁶¹

Justice DeBruler dissented, and equated the personal advisement rule with *Miranda* rights.²⁶² The purpose of the rule is to safeguard the underlying rights.²⁶³ By requiring a colloquy between the trial judge and the defendant, the record would reflect not only the defendant's knowledge of the rights but also a manifestation of a freely made decision to forego those rights.²⁶⁴ Rehabilitation of the record by postconviction testimony may demonstrate the defendant's knowledge of his rights, but it may not provide any manifestation of a decision to forego the rights freely made by the defendant.²⁶⁵ In *Youngblood*, no manifestation of waiver was presented. Nevertheless, the majority found the plea to be valid.²⁶⁶

Prosecutorial "persuasion" in the form of an offer to forego filing a habitual offender count in exchange for an immediate, uncounseled guilty plea was addressed by the Indiana Court of Appeals in *Hood v. State*.²⁶⁷ Hood was arrested on April 25, 1986 and incarcerated. Prior to his initial hearing, a prosecutor approached Hood and offered to forego filing a habitual offender count if Hood immediately pleaded guilty, without counsel, to the charged offenses of theft and forgery. Hood pleaded guilty, and thereafter sought post-conviction relief.

On appeal, the court acknowledged that a defendant can be threatened with the filing of an habitual count to induce a plea.²⁶⁸ Thus, the prosecutor in *Hood* could make use of such a threat. However, the prosecutor's insistence on an uncounseled plea was not permissible.²⁶⁹

258. 542 N.E.2d 188 (Ind. 1989).

259. *Id.* at 189.

260. *Id.*

261. *Id.*

262. *Id.* at 190 (DeBruler, J., dissenting).

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 189.

267. 546 N.E.2d 847 (Ind. Ct. App. 1989).

268. *Id.* at 849. Courts see little difference between an offer to forego filing the habitual count to induce a plea and the practice of filing the habitual count and subsequently offering to dismiss it in exchange for a plea. See generally *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Jackson v. State*, 499 N.E.2d 215 (Ind. 1986).

269. *Hood*, 546 N.E.2d at 849.

The court suggested that plea bargaining is premised on the notion that a defendant, advised by counsel and protected by procedural safeguards, is capable of making intelligent choices.²⁷⁰ "Conversely, uncounseled defendants are considered incapable of intelligent choices"²⁷¹ Uncounseled defendants generally are not informed of matters involving likelihood of conviction, probable punishment, and the legal consequences of their conduct.

In addition to stating its view on the value of counsel in plea bargaining, the court referred to federal cases holding that counsel or a valid waiver of counsel is a prerequisite to permissible plea bargaining. Thus, the court appeared to be ready to decide that prosecutorial plea bargaining with an uncounseled defendant vitiates the voluntariness of any resulting plea; however, the court did not decide that issue. The court found that the facts in *Hood* were more egregious than that of a defendant who simply negotiated without counsel because the prosecutor in *Hood* insisted that the defendant waive the right to counsel.²⁷² The court concluded that the State's act of conditioning its offer on the defendant's agreement to forego counsel rendered the plea per se involuntary.²⁷³ Voluntariness was not restored by the defendant's waiver of counsel at the guilty plea hearing because that waiver was tainted by the State's prior action.²⁷⁴

I. Sentencing

The Indiana courts of appeal decided three significant cases dealing with the use of "aggravating circumstances" at sentencing. The Indiana Supreme Court holding in *Willoughby v. State*²⁷⁵ authorizes a trial court to consider uncharged criminal conduct as an aggravating circumstance for purposes of sentencing.²⁷⁶ Willoughby was convicted of murder, robbery, and confinement. During the police investigation on those charges, Willoughby admitted that he disposed of a body in 1975 and that he did not report the event to authorities. This prior conduct was unrelated to the charges actually brought against him. At the time of sentencing, the trial court found that the prior unrelated conduct was an aggravating circumstance.²⁷⁷ Willoughby's sentence was enhanced for this and other reasons.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 850.

275. 552 N.E.2d 462 (Ind. 1990).

276. *Id.* at 470.

277. *Id.* at 471.

On appeal, the Indiana Supreme Court concluded that the prior unrelated conduct properly could be considered as evidence that Willoughby was a criminal accessory after the fact.²⁷⁸ The fact that the conduct had not resulted in a conviction or even in the filing of a charge did not preclude its use at sentencing. The court relied on *Starks v. State*²⁷⁹ to support its holding.²⁸⁰ *Starks*, however, involved pending charges. Arguably, as the concurring and dissenting opinion suggested, pending charges should be considered, not as evidence of criminal conduct, but as evidence that the prior exercise of police authority over the defendant has had no deterrent effect.²⁸¹

Use of either prior arrest records or uncharged conduct as evidence of prior criminal activity is problematic. The problem arises because the evidentiary rules applicable to trial do not apply to sentencing proceedings.²⁸² Thus, for example, hearsay is admissible. Few courts have developed any guidelines to ensure that the evidence of uncharged criminal conduct is reliable. Indiana courts have not done so, nor has Indiana addressed the scope of a defendant's right to challenge such assertions. A defendant confronted with such evidence should be entitled to adequate notice and a hearing to challenge the State's evidence and offer a response.²⁸³ Thus, defendants confronted with such allegations should make a record on the issue.

In *Conwell v. State*,²⁸⁴ the court of appeals found that when a defendant pleads guilty to a lesser-included offense, the trial court may not use the element that distinguishes the lesser from the greater offense as an aggravating factor.²⁸⁵ Conwell was charged with burglary. The charge was classified as a B felony because the building involved was a dwelling. He pleaded guilty to burglary as a C felony pursuant to a plea agreement. At sentencing, the trial court found that the defendant's lack of any criminal history was a mitigating circumstance. The court also found an aggravating circumstance — the burglarized building was

278. *Id.* at 470.

279. 489 N.E.2d 43 (Ind. 1986).

280. *Willoughby*, 552 N.E.2d at 470.

281. *Id.* at 471 (DeBruler, J., concurring and dissenting).

282. *See Williams v. New York*, 337 U.S. 241 (1949).

283. It is reasonable to assume that the procedural protections which attach to a sentencing hearing would at least be equal to those available in parole revocation hearings. *See Morrissey v. Brewster*, 408 U.S. 471 (1972) (right to notice, disclosure of the State's evidence, opportunity to be heard and to present witnesses, cross-examine, and confrontation unless good cause is shown). *See also Wolff v. McDonnell*, 418 U.S. 539 (1974) (in prison disciplinary hearing, defendant has right to adequate notice and to call witnesses to respond to the allegations).

284. 542 N.E.2d 1024 (Ind. Ct. App. 1989).

285. *Id.* at 1025.

a dwelling. Conwell was sentenced to eight years, a presumptive term of five years with three years added for aggravating circumstances.

The court of appeals analogized Conwell's situation to the facts of *Hammons v. State*.²⁸⁶ In *Hammons*, the Indiana Supreme Court found that a trial court may not impose the maximum sentence on the lesser offense to compensate for the perceived error made by a jury in acquitting the defendant on the greater charge.²⁸⁷ The court of appeals found no distinction between a jury verdict and a plea of guilty.²⁸⁸ In either case, the element that distinguishes the greater from the lesser offense may not be used to enhance the defendant's sentence.²⁸⁹

The last noteworthy case decided in Indiana pertaining to aggravating circumstances is *Lane v. State*.²⁹⁰ In *Lane*, a trial court utilized as an aggravating factor the fact that the defendant, as a juvenile, had been adjudicated as a CHINS (Children In Need of Services). Noting that juveniles adjudged to be CHINS are victims of their circumstances, not juvenile criminals, the court of appeals reversed.²⁹¹ Although a juvenile history of criminal acts can serve as an aggravating circumstance,²⁹² one's status as a CHINS may not so serve.

The next noteworthy sentencing case is the Indiana Supreme Court's decision in *Seay v. State*.²⁹³ From July 14, 1986 to September 2, 1986, the defendant sold controlled substances on four occasions to an undercover policeman and an informant. In February 1987, the defendant was tried on the two counts that arose from the first two sales. He was convicted, found to be an habitual offender, and sentenced to sixty years. While the jury was deliberating in that case, the State filed two new counts based on the last two sales, and again sought the habitual offender enhancement. Seay was tried on the new charges, found guilty, and sentenced to sixty years — fifteen years on each count, consecutive to one another — with one count enhanced by thirty years for the habitual finding. This sentence was imposed consecutive to the first sentence of sixty years.

Seay challenged the second trial on various grounds. On appeal, the supreme court rejected the claim that the State was required to join the

286. 493 N.E.2d 1250 (Ind. 1986).

287. *Id.* at 1253.

288. *Conwell*, 542 N.E.2d at 1025.

289. *Id.*

290. 551 N.E.2d 897 (Ind. Ct. App. 1990).

291. *Id.* at 899.

292. *See Jordan v. State*, 512 N.E.2d 407 (Ind.), *reh. denied*, 516 N.E.2d 1054 (Ind. 1987).

293. 550 N.E.2d 1284 (Ind. 1990).

four charges in one prosecution, as well as the claim that collateral estoppel barred the second prosecution.²⁹⁴ However, relying on *Starks v. State*,²⁹⁵ the court found that the State is barred from seeking multiple habitual offender enhancements by bringing successive prosecutions for charges that could have been consolidated for trial.²⁹⁶ Thus, whether the State seeks two habitual offender enhancements in one trial or separates the charges by initially withholding the filing of all available charges, the State may not secure consecutive habitual offender enhancements.²⁹⁷

Last, pertaining to sentencing, the legislature provided two significant developments. First, the presumptive sentence for a class C felony was reduced from five to four years; four years, instead of three, may now be added for aggravating circumstances; and two years, instead of three, subtracted for mitigating circumstances.²⁹⁸ In short, the sentencing range for a class C felony remains two to eight years, only the presumptive sentence is changed. The presumptive sentence for a class D felony was reduced from two years to a year and a half.²⁹⁹ A year and a half, instead of two, may be added for aggravating circumstances.³⁰⁰ There

294. *Id.* at 1288. Indiana's statutory bars to subsequent prosecutions are set forth in IND. CODE § 35-34-1-10(c) (1988) and IND. CODE § 35-41-4-4 (1988). Both speak in terms of bars to prosecutions for offenses that "could have been joined" or "should have been charged." Nevertheless, case law interpretations have preserved to the State the right not to pursue all charges in a unified action. See *Webb v. State*, 453 N.E.2d 180 (Ind. 1983), *cert. denied*, 465 U.S. 1081 (1984). Thus, without fear of any subsequent bar, the State may separate offenses by not filing some of the charges, even if all the offenses were committed at the same time or during the same criminal episode. *But see* *Grady v. Corbin*, 110 S. Ct. 2084 (1990) (double jeopardy discussion regarding offenses involving the same conduct).

295. 523 N.E.2d 735 (Ind. 1988) (trial courts lack the power to require that habitual offender sentences run consecutively when meting out several sentences).

296. *Seay*, 550 N.E.2d at 1288. It is interesting to note that the court, for purposes of determining if a bar to subsequent prosecution existed, found the mandatory joinder requirement of Indiana Code § 35-34-1-10(b) applicable only to charges actually filed. IND. CODE § 35-34-1-10(b) (1988) (mandatory duty to join related charges arising to common scheme or plan). Yet, the court found that the second set of charges against *Seay*, which were not filed until after the first trial, could have been joined with the initial charges for purposes of determining that pyramiding habitual offender sentences could not be sought. *Seay*, 550 N.E.2d at 1288. It appears that the State retains the ability to withhold charges and force separate trials, but loses part of the incentive to do so.

297. Oddly, in *Starks*, 523 N.E.2d at 737, the remand order directed the trial court to order the two habitual offender enhanced sentences to run concurrently, but in *Seay*, the remand order directed the trial court to vacate the habitual offender sentence enhancement. *Seay*, 550 N.E.2d at 1289.

298. IND. CODE § 35-50-2-6 (1988 & Supp. 1990).

299. *Id.* § 35-50-2-7.

300. *Id.*

was no change in the possible one-year reduction for mitigating circumstances. The range for a class D felony is now one-half year to three years instead of one to four years.

The second legislative development was the approval of the "Boot Camp For Youthful Offenders."³⁰¹ This statute is intended to allow the Department of Corrections to create a facility for youthful offenders that provides a paramilitary environment emphasizing discipline, physical development, treatment intervention, and value modification.³⁰² The program is limited to youthful offenders between the ages of eighteen and twenty-five years, with no prior convictions who are serving a sentence of less than eight years.³⁰³ If the boot camp is successfully completed, the offender is returned to the sentencing court for further disposition.³⁰⁴ The concept has not been implemented yet for want of funding.³⁰⁵

J. Post-conviction

The United States Supreme Court continued its practice of gutting a defendant's right to a meaningful federal review of state court convictions.³⁰⁶ In *Butler v. McKellar*,³⁰⁷ the Court "fine tuned" the rule that in both capital and noncapital cases, "new rules will not be *applied or announced* in cases on collateral review unless they fall into one of two exceptions."³⁰⁸ The exceptions are as follows: (1) The new rule places the conduct beyond the power of the criminal law-making authority to proscribe; and (2) the new rule is implicit in the concept of ordered liberty.³⁰⁹

301. *Id.* §§ 11-14-1-1 to -4-4 (Supp. 1990).

302. *Id.* § 11-14-2-5.

303. *Id.* § 11-14-1-5.

304. *Id.* § 11-14-4-4.

305. Conversation with Hon. Raymond D. Kickbush, Judge, Porter Circuit Court (March 12, 1991) (Judge Kickbush was the principal proponent of the boot-camp concept.).

306. See generally *Wainwright v. Sykes*, 433 U.S. 72 (1977), *overruling* *Fay v. Noia*, 372 U.S. 391 (1963) (a state procedural default bars habeas relief only if the petitioner deliberately bypassed the state courts, and the petitioner must show cause and prejudice to excuse a state court procedural default); *Stone v. Powell*, 428 U.S. 465 (1976) (eliminating fourth-amendment claims by state prisoners from habeas review); *Teague v. Lane*, 109 S. Ct. 1060 (1989) (no new constitutional rules of criminal procedure will be announced on habeas review unless those rules will be applied retroactively to all defendants similarly situated).

307. 110 S. Ct. 1212 (1990).

308. *Id.* at 1216 (emphasis added) (quoting *Penry v. Lynaugh*, 109 S. Ct. 2934, 2944 (1989) (citation omitted)).

309. *Teague v. Lane*, 109 S. Ct. 1060, 1063-64 (1990). The likelihood that the current United States Supreme Court would find a "new rule" that meets either exception is similar to the likelihood that a resurrected Casanova would find something new about sex.

In *Butler*, the Supreme Court addressed the question of whether a rule is new or dictated by existing precedent. The petitioner in *Butler* had been arrested on an assault and battery charge. He invoked his constitutional right to counsel and retained a lawyer. Thereafter, the police informed him that he was a suspect in an unrelated murder case. Butler was again given *Miranda* warnings; he waived his rights and made a statement. The statement was utilized, over Butler's objection, in the state court homicide trial in which he was convicted.

Butler sought federal habeas relief on the ground that the police should not have initiated questioning on the unrelated murder knowing that he had invoked his right to counsel on the assault and battery case. Butler argued that *Edwards v. Arizona*³¹⁰ required the police to refrain from initiating any questioning once the accused invokes his right to counsel on any offense.³¹¹ Butler relied on *United States ex rel Espinoza v. Fairman*³¹² which interpreted *Edwards* to support Butler's claim.³¹³ The Court of Appeals for the Fourth Circuit rejected his argument, finding that *Edwards* did not preclude questioning on an entirely different charge.³¹⁴ The Fourth Circuit found that the contrary holding at the Seventh Circuit's decision in *Espinoza* was an unpersuasive and dramatic extension of *Edwards*.³¹⁵

On the same day that the Fourth Circuit denied rehearing, the Supreme Court decided *Arizona v. Roberson*.³¹⁶ The Court in *Roberson* held that the fifth amendment bars police-initiated interrogation following an accused's request for counsel in a separate investigation.³¹⁷

Butler sought, and the Supreme Court granted, certiorari.³¹⁸ The Supreme Court found that Butler could not rely on *Roberson* because *Roberson* announced a new rule.³¹⁹ Butler pointed out that the majority in *Roberson* had said the case was directly controlled by *Edwards* and that, in *Roberson*, Arizona had specifically asked the Court to create an exception to *Edwards*.³²⁰ Notwithstanding, the majority in *Butler* found that a new rule is announced even if a prior decision controls the result, but that result is "susceptible to debate among reasonable minds."³²¹

310. 451 U.S. 477 (1981).

311. *Butler*, 110 S. Ct. at 1214.

312. 813 F.2d 117 (7th Cir. 1987).

313. *Butler*, 110 S. Ct. at 1215.

314. *Butler v. Aiken*, 846 F.2d 255 (4th Cir. 1988).

315. *Id.* at 258.

316. 486 U.S. 675 (1988).

317. *Id.* at 687-88.

318. 109 S. Ct. 1952 (1989).

319. *Butler*, 110 S. Ct. at 1218.

320. *Id.*

321. *Id.* at 1217.

As the dissent noted, *Butler* apparently held that a ruling sought by a habeas petitioner will be deemed "new" unless the challenged procedure "was so clearly invalid under the then prevailing legal standards that the decision could not be defended by any reasonable jurist."³²² As indicated, new rules will neither be *applied nor announced* on habeas unless the petitioner falls into one of two previously stated exceptions.³²³ Given *Butler's* broad definition of "new rule" and the rigor of the two exceptions to the "new rule" doctrine, one can conclude that the review available to state prisoners on federal habeas has been substantially diminished.

K. Death Penalty

The most significant death penalty case for Indiana practitioners is *Daniels v. State*.³²⁴ This case is significant because the Indiana Supreme Court has chosen to adopt the federal habeas "new rule" doctrine and apply the same to Indiana postconviction proceedings.³²⁵ In *Daniels*, the defendant was convicted of felony murder, among other charges, and sentenced to death. At the penalty phase, the prosecutor made statements concerning personal characteristics of the victim. The statements probably offended the rulings in *Booth v. Maryland*³²⁶ and *South Carolina v. Gathers*³²⁷ because descriptions of the victim's personal characteristics and descriptions of the emotional impact of the crime on the victim's family, both of which involve factors not known to the defendant at the time of the offense, are unrelated to the blameworthiness of the defendant and, therefore, are inconsistent with the reasoned decision-making required in capital cases.³²⁸

Daniels presented the *Booth* claim in post-conviction proceedings. The Indiana Supreme Court rejected the claim on the merits.³²⁹ The United States Supreme Court granted certiorari and remanded the case for reconsideration in light of *Gathers*.³³⁰

On remand, the Indiana Supreme Court abandoned its established rule on retroactivity,³³¹ noting that its prior position had been influenced

322. *Id.* at 1219 (Brennan, J., dissenting).

323. *Id.* at 1218.

324. 561 N.E.2d 487 (Ind. 1990).

325. *Id.* at 489.

326. 482 U.S. 496 (1987).

327. 109 S. Ct. 2207 (1989).

328. See *South Carolina v. Gathers*, 109 S. Ct. 2207 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987).

329. *Daniels v. State*, 528 N.E.2d 775 (Ind. 1988).

330. See *Gathers*, 109 S. Ct. at 2207.

331. See *Rowley v. State*, 483 N.E.2d 1078, 1082 (Ind. 1985) (a new rule should

by then-existing federal case law.³³² The court found that federal revisions, as set forth in *Teague v. Lane*³³³ and *Penry v. Lynaugh*,³³⁴ suggested that an analogous revision was appropriate for Indiana.³³⁵ Thus, the court adopted the principle that new rules will not be applied in Indiana collateral proceedings unless the rule falls within one of two exceptions: (1) The rule places certain kinds of conduct beyond the power of the criminal law-making authority to proscribe; and (2) the rule requires the observance of procedures implicit in the concept of ordered liberty and without which the likelihood of an accurate conviction is seriously diminished.³³⁶ The court, while noting that the State was not asserting waiver, concluded that *Booth* and *Gathers* announced a new rule, and that rule did not qualify under either exception.³³⁷

Clearly, the majority decision in *Daniels* narrows the scope of available review in postconviction proceedings. This restriction is damaging, particularly to death penalty litigants, because of the dynamic nature of death penalty law.³³⁸ The narrowing scope of state and federal review can be seen as part of the ongoing effort to accord greater finality to criminal judgments. Finality may have virtue, but the vice of finality is uncorrected error.

be applied retroactively and, thus, be available in postconviction proceedings if the rule is directly designed to enhance the reliability of criminal trials rather than being only tangentially related to truth finding).

332. *Daniels*, 561 N.E.2d at 488-89.

333. 489 U.S. 288 (1989).

334. 109 S. Ct. 2934 (1989).

335. *Daniels*, 561 N.E.2d at 489.

336. *Id.* The court noted that the second exception has been defined, in federal cases, as requiring a new rule that "must not only improve accuracy, but also alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id.* (quoting *Sawyer v. Smith*, 110 S. Ct. 2822, 2831 (1990)). The court also pointed out that the exceptions may prove inadequate and other particularized exceptions may be required. *Id.* at 490 n.3.

337. *Id.* at 490-91. Justice DeBrueler dissented and observed that the court had previously addressed the merits of the *Booth* claim in *Daniels*'s direct appeal from denial of postconviction relief. *Id.* at 492 (DeBrueler, J., dissenting). See *Daniels v. State*, 528 N.E.2d 775 (1988). Given this fact and that the remand order called for the court to address the same issue again in light of *Gathers*, the dissent concluded that the threshold question of whether to address the merits was not before the court. *Daniels*, 561 N.E.2d at 492 (DeBrueler, J., dissenting).

338. Recall that under the federal definition, a rule is a "new rule" unless the challenged procedure "was so clearly invalid under then prevailing legal standards that the decision could not be defended by any reasonable jurist." *Butler*, 110 S. Ct. at 1219 (Brennan, J., dissenting). Thus, a slight variation in the application of a principle may trigger the "new rule" doctrine. Dynamic areas of the law inevitably involve many such slight variations.

IV. CONCLUSION

The United States Supreme Court and the Indiana courts continue to allocate a large portion of their respective dockets to criminal cases. Working through the implicit tension between our interest in crime enforcement and our interest in procedural fairness is a never-ending process.

Seller Beware: The Indiana Responsible Property Transfer Law

ANNE SLAUGHTER ANDREW*

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To respond to mounting public concern about contaminated property, Congress adopted Superfund in 1980.¹ It soon became clear that remedying contaminated property under Superfund would be a long, expensive process. States began to consider additional procedures for addressing contaminated property, procedures that might be potentially more efficient than Superfund.

In 1983, New Jersey broke new ground in this effort by adopting a law that imposed a precondition on the transfer of certain properties: the seller must declare that no hazardous substances or wastes remain on the property or the seller must execute an approved cleanup plan for the property.² Since the New Jersey law was adopted, other states have adopted laws that, at the least, seek to have sellers identify contaminated property before transferring it to a new owner.³

In 1989, Indiana joined the trend when the Indiana General Assembly adopted the Indiana Responsible Property Transfer Law (the "Transfer Law").⁴ As adopted and amended in 1990,⁵ the Transfer Law applies to certain transfers of certain real estate that become final on or after January

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The views expressed in this Article are solely those of the authors and do not reflect the views of their employers. The opinions expressed in this Article are not intended to be legal advice.

1. The Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1980), also popularly known as "Superfund."

2. Environmental Cleanup Responsibility Act, N.J. STAT. ANN. § 13:K-6-35 (West 1990).

3. See, e.g., CONN. GEN. STAT. ANN. §§ 22a-114 to -134hh (West Supp. 1985); Illinois Responsible Property Transfer Act, ILL. ANN. STAT. ch. 30, para. 901-07 (Smith-Hurd Supp. 1990).

4. Pub. L. No. 166-1989, 1989 Ind. Acts 1438 (codified at IND. CODE § 13-7-22.5 (Supp. 1990)).

5. Pub. L. No. 19-1990, §§ 24-35, 1990 Ind. Acts 946-959.

1, 1990,⁶ and provides generally that: (1) the transferor of certain subject properties shall provide an environmental disclosure document (Disclosure Document) to the transferee and to the lender;⁷ (2) prior to closing, the transferee and lender have the opportunity to void the transaction if previously unknown "environmental defects" are revealed by the Disclosure Document,⁸ or, within certain limits, if the transferee fails to provide the Disclosure Document in a timely manner;⁹ (3) the Disclosure Document shall be recorded in the office of the recorder of the county in which the property is located and a copy must be filed with the Indiana Department of Environmental Management.¹⁰

This Article provides an overview of the types of transactions and properties that are subject to the Transfer Law and an overview of the general requirements of the Transfer Law. The Article then provides a more detailed discussion of how to determine if a particular property is subject to the Transfer Law. In conclusion, the impact of the Transfer Law on buyers' and sellers' environmental law liabilities is discussed briefly.

I. FRAMEWORK OF THE TRANSFER LAW

The Transfer Law affects only certain transfers of certain types of property. Two questions must be addressed to determine whether a particular transaction is subject to the Transfer Law: first, is the "transfer" covered by the Transfer Law; and second, is the "property" subject to the Transfer Law. To answer these questions, the Transfer Law's definitions for the terms "transfer" and "property" must be considered.

A. *Transactions Subject to the Transfer Law*

The term "transfer" is defined as "a conveyance of an interest in property" by any of several methods, including a deed conveying fee title, a mortgage, a lease with a term of more than forty years, a lease with an option to purchase, or an installment contract for the sale of land.¹¹

6. Pub. L. No. 166-1989, § 2, 1989 Ind. Acts 1449.

7. See generally IND. CODE § 13-7-22.5-10(a) (Supp. 1990).

8. *Id.* § 13-7-22.5-11.

9. *Id.* § 13-7-22.5-12.

10. *Id.* § 13-7-22.5-16.

11. The definition of the term "transfer" is as follows:

A conveyance of an interest in property by any of the following:

- (1) A deed or other instrument of conveyance of fee title to property.
- (2) A lease whose term if all options were exercised, would be more than forty (40) years.
- (3) An assignment of more than twenty-five percent (25%) of the ben-

The term "transfer" specifically does not include certain conveyances, such as deeds of partitions and easements.¹²

It is important to note that *not* all types of transactions are expressly addressed by the statutory definitions for the term "transfer." For example, a transfer of corporate property by acquisition of stock or a sale/leaseback financing transaction is neither specifically included nor specifically excluded from the definition of the term "transfer." Thus, the applicability of the Transfer Law is subject to interpretation for any transaction outside the express parameters of the defined term "transfer."

B. Properties Subject to the Transfer Law

The Transfer Law defines the term "property" as a "specific and

eficial interest in a land trust.

- (4) A collateral assignment of a beneficial interest in a land trust.
- (5) An installment contract for the sale of property.
- (6) A mortgage or trust deed.
- (7) A lease of any duration that includes an option to purchase.

Id. § 13-7-22.5-7(a).

This definition reflects amendments made by the General Assembly in 1990 to clarify the applicability of the Transfer Law to mortgages and leases with an option to purchase, as well as to clarify that installment contracts are "contracts for sale" covered by the Transfer Law. Pub. L. No. 19-1990, § 26, 1990 Ind. Acts 947-48.

12. The term "transfer" does *not* include a conveyance of an interest in property by any of the following:

- (1) A deed or trust document, which without additional consideration, confirms, corrects, modifies, or supplements a deed or trust document that was previously recorded.
- (2) A deed or trust document that, without additional consideration, changes title to property without changing beneficial interest.
- (3) A tax deed or a deed from a county transferring property the county received under I.C. 6-1.1-25-5.5.
- (4) An instrument of release of an interest in property that is security for a debt or other obligation.
- (5) A deed of partition.
- (6) A conveyance occurring as a result of the foreclosure of a mortgage or other lien on real property.
- (7) An easement.
- (8) A conveyance of an interest in minerals, gas, or oil (including a lease).
- (9) A conveyance by operation of law upon the death of a joint tenant with right of survivorship.
- (10) An inheritance or devise.
- (11) A deed in lieu of foreclosure.
- (12) A Uniform Commercial Code sale or other foreclosure of collateral assignment of a beneficial interest in a land trust.
- (13) A deed that conveys fee title under an installment contract for the sale of property.
- (14) A deed that conveys fee title under an exercise of an option to purchase contained in a lease of property.

IND. CODE § 13-7-22.5-7(b) (Supp. 1990).

identifiable parcel of real property, including any improvements”¹³ that (1) “contains one (1) or more facilities that are subject to reporting under Section 312 of the federal Emergency Planning and Community Right-to-Know Act of 1986,”¹⁴ (2) is the site of one (1) or more underground storage tanks (“UST”) for which notification is required,¹⁵ or, (3) “is listed on the Comprehensive Environmental Response, Compensation and Liability Information System (“CERCLIS”),”¹⁶ *but*, does not include any property that (4) has been subject to, and released from, financial assurance requirements.¹⁷

Thus, to be subject to the Transfer Law, the “property” must meet one of the first three requirements listed above *and* not be excluded by the fourth requirement.

Determining whether a particular property is subject to the Transfer Law requires a basic understanding of certain substantive areas of environmental law and specific knowledge about the transfer property. It is likely that a transferor may not know whether the property and its improvements are subject to the environmental regulatory programs that trigger the Transfer Law. Specialized legal and/or technical assistance may be necessary to determine whether a particular property is subject to the Transfer Law. The legal analysis for determining whether a particular property is subject to the Transfer Law is discussed in detail below.¹⁸

C. *Obligations and Liabilities Under the Transfer Law*

1. *Delivery of the Disclosure Document.*—In general, the “transferor” of the property (*e.g.*, the seller) is required to deliver the Disclosure Document to the “transferee” (*e.g.*, the buyer) and to the lender at least *thirty days prior to the transfer*.¹⁹ The transferor must sign this Disclosure Document and certify that the information contained therein is true and accurate to the best of the transferor’s knowledge and belief.²⁰ The transferee must also sign and date the Disclosure Document, acknowledging its delivery.²¹

The 1990 amendments to the Transfer Law clarify that if a lender is not identified to the transferor at least thirty days in advance of the

13. *Id.* § 13-7-22.5-6.

14. *Id.* § 13-7-22.5-6(1).

15. *Id.* § 13-7-22.5-6(2).

16. *Id.* § 13-7-22.5-6(3).

17. *Id.* § 13-7-22.5-6.

18. *See infra* notes 57-102 and accompanying text.

19. IND. CODE § 13-7-22.5-10(a) (Supp. 1990).

20. *Id.* § 13-7-22.5-15. See the disclosure form provided in Appendix A to this Article.

21. IND. CODE § 13-7-22.5-15 (Supp. 1990). The signature of the transferee is not

transfer, the thirty-day deadline to provide the Disclosure Document is not applicable.²² However, once the lender is identified, the transferor is required to provide the document to the lender immediately.²³

The amended Transfer Law also clarifies the roles of the buyer/borrower and the lender in an "acquisition" transaction versus a "financing" transaction.²⁴ In an "acquisition" transaction, a buyer/borrower who finances a purchase of real property with a mortgage is not a "transferor" required to provide the Disclosure Document to the lender, nor is the lender a "transferee" required to record or file such document. The *seller* is the only transferor who must provide the Disclosure Document to the buyer *and* the lender.²⁵ In contrast, in a "financing" transaction when a borrower seeks a loan from a lender and offers *already-acquired* property as collateral, the borrower is the "transferor" and the lender is the "transferee," and each has the respective obligations of a transferor and transferee. Even under these circumstances, however, the lender, as a transferee, does *not* have an obligation to record the Disclosure Document with the county recorder's office.²⁶

If all of the parties to the transfer agree, the transferor is not required to deliver the Disclosure Document thirty days prior to the transfer.²⁷ In order to waive this requirement, the parties' agreement must be in writing. The parties must indicate in the waiver that they are aware of the purpose and intent of the Disclosure Document, and the waiver must be signed by all the parties. If a written waiver of the thirty-day requirement is obtained, the Transfer Law then requires that the Disclosure Document be provided to the parties to the transaction "on or before the date on which the transfer of property is to become final"²⁸ (that is, at or before closing). The Transfer Law does *not* allow the parties to waive the transferor's obligation to deliver the Disclosure Document; they may only waive the requirement that it be delivered thirty days before the transfer.

2. The Disclosure Document.—The Transfer Law prescribes the form of the Disclosure Document.²⁹ The Disclosure Document is provided in Appendix A to this Article. In addition to general information regarding

required on a document delivered to a lender, presumably in an acquisition transaction. *Id.* § 13-7-22.5-10(a).

22. Pub. L. No. 19-1990, § 29, 1990 Ind. Acts 949-50 (codified at IND. CODE § 13-7-22.5-10(c) (Supp. 1990)).

23. *Id.*

24. See IND. CODE § 13-7-22.5-19.5 (Supp. 1990).

25. *Id.* § 13-7-22.5-19.5(b).

26. *Id.* § 13-7-22.5-19.5(c).

27. *Id.* § 13-7-22.5-10(b).

28. *Id.*

29. *Id.* § 13-7-22.5-1 to -15.

the transfer, the Disclosure Document contains a series of questions regarding the transferor's activities on the property which may have created an adverse environmental condition. For example, the transferor must disclose whether any operations it conducted on-site involved hazardous wastes, hazardous substances, or petroleum, and whether such materials have been stored, treated, or disposed of on-site.³⁰ The transferor must disclose any environmental permits held for discharging pollutants into the air or the water, or for waste treatment, storage, or disposal.³¹ The transferor must also disclose whether the transferor ever conducted an activity at the property *without* the required environmental permits.³² The transferor is also required to disclose environmental enforcement actions taken against the transferor and any environmental releases at the property that have occurred during transferor's ownership.³³

The Disclosure Document requires disclosures from the transferor regarding environmental activities on the property by prior owners or tenants. However, such disclosures appear to be limited to the known existence of any on-site facilities to store, treat, or dispose of substances or wastes.³⁴

The format of the Disclosure Document generally consists of "yes or no" questions. The answers to these questions provide information regarding certain activities related to the property. However, the Disclosure Document may not give the transferee or lender sufficient information to evaluate the environmental conditions of the property. For example, the transferee or lender may want to know the quantity and type of any hazardous substances identified as used on-site, or whether the activities identified in the Disclosure Document (such as underground storage tanks) caused any actual environmental contamination. In sum, the Disclosure Document provides notice of environmentally related activities, but may not disclose the effect of those activities on the property. As discussed in Section III below, the Disclosure Document should not be the sole, or even the primary, source of information about the property.

3. *Voiding the Transaction for Disclosed Environmental Defects.*—If the Disclosure Document reveals "environmental defects" that were previously unknown to the transferee or lender, that party is relieved of any obligation to accept the transfer or to finance the transfer.³⁵ This opportunity, however, expires once the property is transferred: the transferee

30. Disclosure Document, Part III, A, *infra* app. A.

31. *Id.* at question 5.

32. *Id.* at question 11. Note: a positive response to this question may expose the transferor to civil and criminal liability under the environmental laws.

33. *Id.* at questions 8 and 9.

34. *Id.* at Part III, B.

35. IND. CODE § 13-7-22.5-11 (Supp. 1990).

and the lender may *not* void their obligations regarding the transaction "after the transfer of property has taken place."³⁶

As adopted, the Transfer Law did not define what may constitute an "environmental defect." As a result, an "environmental defect" appeared to be a negotiable term among the parties. In 1990, the Transfer Law was amended by adding a definition for the term "environmental defect"³⁷ and including on the Disclosure Document a question asking whether there is an "environmental defect" on the property. Obviously, if the transferor now responds on the Disclosure Document that there is an environmental defect on the property, the transferee or lender may have an opportunity to void the transaction.

Except for this type of disclosure, arguably the transferee is in no better position than before to determine if the Disclosure Document reveals an "environmental defect." The definition for this term is broad and appears to be subjective. For example, if the transferor discloses that it managed hazardous waste at the site, would this activity alone present a "substantial endangerment" to the value of the property? Because determining what constitutes the disclosure of an "environmental defect" under the Transfer Law could result in a long and expensive legal battle, the parties may still benefit by setting forth more specifically in the purchase agreement what type of environmental conditions at the property would provide the transferee or lender the opportunity to void the transaction.

It is important to note that the Transfer Law provides an opportunity for the lender and/or the transferee to void the transaction *only* if the Disclosure Document reveals "previously unknown" environmental de-

36. *Id.* § 13-7-22.5-14.

37. The term "environmental defect" is defined in the amended Transfer Law as an environmentally related commission, omission, activity, or condition that:

- (1) constitutes a material violation of an environmental statute, regulation, or ordinance;
- (2) would require remedial activity under an environmental statute, regulation, or ordinance;
- (3) presents a substantial endangerment to:
 - (A) the public health;
 - (B) the public welfare; or
 - (C) the environment;
- (4) would have a material, adverse effect of the market value of the property or of an abutting property; or
- (5) would prevent or materially interfere with another party's ability to obtain a permit or license that is required under an environmental statute, regulation, or ordinance to operate the property or a facility or process on the property.

Pub. L. No. 19-1990, § 24, 1990 Ind. Acts 946-47 (codified at IND. CODE § 13-7-22.5-1.5 (Supp. 1990)).

fects.³⁸ Thus, the issue may arise as to what the transferee or lender knew about the environmental condition of the property prior to receiving the Disclosure Document. Because the Transfer Law does not define "previously unknown," if the transferee or lender obtains information about environmental defects from other sources before receiving the Disclosure Document (e.g., from an environmental audit report by an independent environmental consultant), such information may constitute prior knowledge of environmental defects. Arguably, this would preclude the transferee or lender from voiding the transaction under the Transfer Law.

4. *Voiding the Transaction for Failure to Provide the Disclosure Document.*—Under the amended Transfer Law, if the transferor fails to provide the Disclosure Document at least thirty days prior to the transfer, any party to the transfer may demand that a Disclosure Document be produced within the following ten days.³⁹ Similarly, if the transferor has obtained a waiver of the thirty-day deadline, but the Disclosure Document is not provided to the other parties before the date when the transaction is to become final, a party may demand that the Disclosure Document be provided within the following ten days.⁴⁰ Under either scenario, if the Disclosure Document is not delivered within ten days of the demand, the transferee or lender may void its obligation to accept the transfer or to finance the transfer, respectively. However, if a Disclosure Document is delivered within the ten-day period, the transferee and lender have additional time to evaluate the Disclosure Document. At that point, the transferee or lender *may void* its obligation to accept or to finance the transfer, respectively, *only* if the Disclosure Document reveals previously unknown environmental defects.

5. *The Parties' Obligations to Record and File the Disclosure Document.*—Within thirty days after the effective date of the transfer, the *transferor* or *transferee* is required to record the Disclosure Document, along with any site plan prepared with the Disclosure Document, in the county recorder's office in the county where the property is located.⁴¹ The *transferor* also has an obligation to file a copy of the Disclosure Document with the Indiana Department of Environmental Management.⁴²

The amended Transfer Law provides that if a recorded Disclosure Document reports the existence of an environmental defect on the property, then a person who has a financial interest in the property may record, in the same recorder's office in which the Disclosure Document is recorded, a document reporting that the environmental defect has been *eliminated*

38. IND. CODE § 13-7-22.5-11 (Supp. 1990).

39. *Id.* § 13-7-22.5-12.

40. *Id.* § 13-7-22.5-13.

41. *Id.* § 13-7-22.5-16(a) to (b).

42. *Id.* § 13-7-22.5-16(a)(2).

from the property.⁴³ This document must be certified by a registered professional engineer who does not have a financial interest in the property.⁴⁴ The ability to record the elimination of an environmental defect may provide an opportunity to clarify uncertainty regarding the environmental condition of the property. However, an issue likely to arise is what level of "clean-up" is sufficient to "eliminate" a recorded environmental defect.

6. *Penalties for Failure to Comply with the Transfer Law.*—The General Assembly established criminal sanctions for violating the Transfer Law.⁴⁵ The failure of the transferor to deliver a Disclosure Document is a Class B infraction, carrying a maximum fine of \$1,000.⁴⁶ Knowingly making a false statement in the Disclosure Document is a Class A infraction, carrying a maximum fine of \$10,000.⁴⁷ Failure by the transferee or transferor to record the Disclosure Document is also a Class A infraction.⁴⁸ However, a transferee is not liable for failing to record the Disclosure Document if the transferee did not receive a Disclosure Document, or if the Disclosure Document contains one or more false statements.⁴⁹

In addition to these sanctions, the Transfer Law provides a civil cause of action that allows any party to a transfer to bring an action against any other party to the transfer to recover consequential damages for violations for the Transfer Law.⁵⁰ Although these violations are not explicitly set forth in the law, it appears that failure to provide a timely Disclosure Document, knowingly making a false statement in the Disclosure Document, and failing to record the document would constitute violations for which a lawsuit could be brought.

II. HOW TO DETERMINE IF PROPERTY IS SUBJECT TO THE TRANSFER LAW

One of the more difficult aspects of implementing the new Transfer Law is determining what property is subject to the requirements of the Transfer Law. This determination generally requires consideration of whether the property is subject to certain environmental regulatory programs. This Article will suggest a procedure, from an environmental law perspective, for determining whether a particular property is subject to the Transfer Law.

43. *Id.* § 13-7-22.5-22.

44. *Id.*

45. *See id.* §§ 13-7-22.5-17 to -19.

46. *Id.* § 13-7-22.5-17.

47. *Id.* § 13-7-22.5-18.

48. *Id.* § 13-7-22.5-19.

49. *Id.*

50. *Id.* § 13-7-22.5-21.

In determining what properties are subject to the Transfer Law, an important caveat should be kept in mind: not all properties that pose environmental risks, and thus represent potential liability for a buyer, will be subject to the Transfer Law. One should not rely on the Transfer Law to act as the sole indicator of whether a property is potentially contaminated. The process of determining whether there are environmental liabilities associated with a property should be separate and distinct from determining the applicability of the Transfer Law.

As discussed above, the Transfer Law does *not* apply to all transfers of real property.⁵¹ It does apply to the transfer of certain parcels of real estate subject to the environmental regulatory or enforcement programs described in the Transfer Law, which may include real estate on the CERCLIS list, real estate on which regulated underground storage tanks ("USTs") are located, or real estate upon which is located a facility subject to reporting under Section 312 of the federal Emergency Planning and Community Right-to-Know Act ("Section 312").⁵² It has been estimated, assuming there are no overlaps between the categories, that over 41,000 Indiana properties might be affected by the Transfer Law.⁵³

A. General Considerations in Determining Whether Property is Subject to the Law

To determine if a property is subject to the Transfer Law, it is necessary to determine whether the property falls within one of the three environmental regulatory categories described in the Transfer Law, and whether the property is excluded from the Transfer Law because of the release of legally required financial assurance mechanisms under certain environmental programs. This Article will first outline each of the three environmental regulatory programs that would subject the property to the Transfer Law and then will address the exclusion. This format is followed because the exclusion depends upon the release of certain financial assurance requirements and, due to the extended time before such releases become effective, it appears that this "exclusion" may not have a practical impact on transfers of property subject to the Transfer Law for some years to come.

Before reviewing the details of the regulatory programs, however, it is important to note several general matters that may affect the analysis under each regulatory program. As a general rule, the determination of the Transfer Law's applicability depends on the characteristics of the

51. See *supra* notes 13-14 and accompanying text.

52. *Id.*

53. See L. Kane, *Enactments of the 1989 General Assembly Affecting Environmental Issues*, at 5 (presented to the Indiana Bar Association, July 12, 1989).

property, not the activities of the seller. Thus, for example, the Transfer Law applies to a property that is the "site of one or more underground storage tanks for which notification is required" ⁵⁴ The *transferor* may not have installed the USTs, may not own the USTs, and may not have had the responsibility to comply with the UST notification requirements, yet the *property* may be the site of a UST subject to notification; thus, the transfer of the property is subject to the Transfer Law. Therefore, it is not only the activity of the transferor that may make the property subject to the Transfer Law; the activities of prior or present lessees, as well as any prior owners, may cause the property to be subject to the Transfer Law.

It is also important to note that the Transfer Law applies not only to properties subject to, and in compliance with, the trigger environmental regulatory programs, but also to those properties which are *subject to* those requirements and are *not* in compliance.⁵⁵ Of course, if the transferor is aware that the property is subject to any of these regulatory programs and is already in compliance, the determination regarding the applicability of the Transfer Law is greatly simplified. Based on the authors' experience, however, it is not unusual for a transferor to be unaware that the property is listed on the CERCLIS list, that there are USTs at the property, or that the Section 312 reporting requirements apply to the property.

In contrast, there also may be properties that are *not* legally subject to the UST or the Section 312 regulatory programs, but owners or operators may have filed the notification or reporting forms anyway. This phenomenon is often referred to as "protective notification" or "protective filing." Because the penalties for violating these environmental regulations can be so severe (such as civil penalties ranging from \$10,000-25,000 per day of violation, and criminal penalties for certain violations)⁵⁶ and because it can be quite time-consuming and complex to determine if the rules apply to a particular property, some owners and operators of properties simply file the required notifications to protect against the possibility of future government enforcement action. The filing of such protective notifications does not affect whether the property is actually subject to the trigger environmental regulatory programs.

In sum, in order to draw a conclusion regarding whether a property is subject to the Transfer Law, it is necessary to evaluate whether the *property* is subject to one of the three specified regulatory programs. A careful evaluation would require an investigation of the property as well

54. IND. CODE § 13-7-22.5-6(2)(B) (Supp. 1990).

55. If the transferor is subject to these programs but not in compliance, the transferor should be made aware of the potential liabilities for noncompliance with such environmental regulatory programs.

56. See IND. CODE §§ 13-7-13-1, -3 (1988).

as the activities of the transferor and any lessees or prior owners at the property.

B. Suggested Procedure for Determining Applicability of the Transfer Law

Because property is subject to the Transfer Law if it fits in only one of the three statutorily described categories, and is not excluded by the release of financial assurance mechanisms, it appears to be more efficient to review the three categories systematically. Unless it is already known that the property is subject to one of the relevant regulatory categories, the following sequence of inquiry may be useful:

1. Is the property listed on the CERCLIS list?
2. Is the property subject to UST notification?
3. Is the property subject to the Section 312 reporting requirements?

If the answer to any of these questions is yes, the property is covered by the Transfer Law, unless it has been subject to financial assurance requirements that have been released.

The suggested review begins with what is typically the most straightforward, easily determinable category: determining whether the property is on the CERCLIS list. Then, if necessary, the review would proceed to determine if there are USTs at the property subject to notification. Finally, if necessary, the review must address whether the property is subject to Section 312 reporting requirements. Each of the three regulatory programs, as well as the exclusion for release of financial assurances, is discussed in detail in the following sections.

1. Is the Property Listed on the CERCLIS List in Accordance with Section 116 of CERCLA?—Property that is “listed on the Comprehensive Environmental Response, Compensation and Liability Information System (“CERCLIS”) in accordance with Section 116 of CERCLA (42 U.S.C. 9616)” is subject to the Transfer Law.⁵⁷

CERCLIS is a list of contaminated or potentially contaminated sites maintained by the United States Environmental Protection Agency (“EPA”) and the Indiana Department of Environmental Management (“IDEM”). The compilation of this list began under the authority of the Resource Conservation and Recovery Act (“RCRA”).⁵⁸ RCRA required each state to “compile, publish, and submit” to EPA an inventory of sites “at which hazardous waste has at any time been stored or disposed of.”⁵⁹

57. *Id.* § 13-7-22.5-6(2)(C) (Supp. 1990).

58. *See* 42 U.S.C. § 6901, 6933 (1988).

59. *Id.* § 6933.

Initially, no appropriation was made by Congress to fund the hazardous waste inventory program under RCRA.⁶⁰ In 1982, Congress appropriated ten million dollars to the program from the Hazardous Substances Response Trust Fund established under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA or Superfund").⁶¹ EPA interpreted Congress's action of appropriating Superfund monies to fund the inventory program as an indication that Congress intended the program "to benefit the purpose of both RCRA and CERCLA."⁶² The list of sites developed under RCRA became the core of the Superfund review process. This list eventually came to be referred to as the Comprehensive Environmental Response Compensation & Liability Information System or "CERCLIS" list.

The first statutory reference to CERCLIS was in the Superfund Amendments and Reauthorization Act of 1986 ("SARA").⁶³ Congress established deadlines by which EPA was to complete preliminary assessments, in accordance with Superfund, of "all facilities that are contained (as of October 17, 1986) in the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS)."⁶⁴ As for a site added to the CERCLIS list after October 17, 1986, SARA also provides that such site shall be evaluated for Superfund clean-up, based on the criteria of the National Contingency Plan, within four years of the site being listed on the CERCLIS list.⁶⁵

The Transfer Law's reference to sites listed on "CERCLIS in accordance with § 116 of CERCLA"⁶⁶ is mystifying. CERCLA section 116 merely establishes deadlines for EPA to evaluate sites already on the CERCLIS list. It does not discuss any procedure for listing sites "in accordance with § 116."

In the National Contingency Plan, EPA has provided the following information about sites on the CERCLIS list:

"CERCLIS" is the abbreviation of the CERCLA Information System, EPA's comprehensive data base and management system that inventories and tracks releases addressed or needing to be addressed by the Superfund program. CERCLIS contains the official inventory of CERCLA sites and supports EPAs site planning and tracking functions. Sites that EPA decides do not warrant

60. See 48 Fed. Reg. 5684 (1983).

61. 42 U.S.C. §§ 9601-9675 (1988). See 48 Fed. Reg. 5689 (1983).

62. 48 Fed. Reg. 5684 (1983).

63. Pub. L. No. 99-499, 100 Stat. 1613. See 42 U.S.C. § 9616 (1988).

64. 42 U.S.C. § 9616(a)(1) (1988).

65. *Id.* § 9616(b).

66. IND. CODE § 13-7-22.5-6(3) (Supp. 1990); see 42 U.S.C. § 9616.

moving further in the site evaluation process are given a "No Further Response Action Planned" (NFRAP) designation in CERCLIS. This means that no additional federal steps under CERCLA will be taken at the site unless future information so warrants. Sites are not removed from the data base after completion of evaluation in order to document that these evaluations took place and to preclude the possibility that they be needlessly repeated. Inclusion of a specific site or area in the CERCLIS data base does not represent a determination of any party's liability, nor does it represent a finding that any response action is necessary.⁶⁷

In sum, properties included on the CERCLIS list are not necessarily contaminated: the list is used as a management tool by EPA and IDEM to keep track of both contaminated and potentially contaminated sites. A site may be listed on CERCLIS due to, *inter alia*, reports submitted by a property owner, investigations by state officials, or complaints from neighboring landowners. The sites on the CERCLIS list are systematically reviewed by state and federal officials to determine which sites are contaminated to such a degree that remedial action under CERCLA is warranted.

When EPA proposed its CERCLIS definition, it provided the following discussion:

CERCLIS contains *active and inactive* (i.e., previously addressed) sites. EPA archives inactive sites in CERCLIS as a historical record of accomplishment. *For informational and dissemination purposes, EPA considers only active sites.*⁶⁸

This approach would suggest that inactive sites are not to be included on the CERCLIS list distributed to the public. However, CERCLIS sites designated for "no further action" are not excluded from the CERCLIS list that EPA and IDEM make available to the public. Thus, any site on the CERCLIS list, even one that has been cleaned-up, is arguably a property subject to the Transfer Law.

2. *Does the Property Contain Underground Storage Tanks for Which Notification is Required?*—Property that is the site of a UST for which notification is required under federal and state law is subject to the Transfer Law.⁶⁹ Two issues are posed by this section of the Transfer Law:

67. 40 C.F.R. § 300.5 (1990).

68. 53 Fed. Reg. 51,399 (1988) (emphasis added).

69. See IND. CODE § 13-7-22.5-6(2) (Supp. 1990). Indiana's UST statute authorizes IDEM to issue rules requiring notification "of operational and nonoperational underground storage tanks as required under 42 U.S.C. 6991a(a)." *Id.* § 13-7-20-13(8)(a). However, such rules have not been promulgated. Thus, the only UST notification requirements currently in effect are the federal requirements under RCRA. However, IDEM is the state agency in Indiana designated to receive the federal UST notification forms.

is there a UST, as that term is defined by law and, if so, is that UST subject to the relevant notification requirements?

a. What is a UST?

The term "underground storage tank" is defined by federal and state law as:

[A]ny one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of *regulated substances*, and the volume of which (including the volume of underground pipes connected thereto) is 10 per centum or more beneath the surface of the ground.⁷⁰

Thus, a regulated UST is an underground tank used to store certain regulated substances.

The term "regulated substances" includes two classes of materials: (1) hazardous substances as defined under Superfund,⁷¹ but not including hazardous wastes regulated by federal law, and (2) petroleum.⁷² In summary, an underground tank must contain a hazardous substance or petroleum to be a regulated UST, and thus to be subject to the UST notification requirements.⁷³

Several types of tanks are specifically excluded from the statutory definition of a UST.⁷⁴ Such excluded tanks include certain farm and residential tanks, certain heating oil tanks, and septic tanks.⁷⁵ Thus, the

70. 42 U.S.C. § 6991(1) (1988) (emphasis added); *see also* IND. CODE § 13-7-20-11 (1988) (similar definition).

71. *See* 42 U.S.C. § 9601(14) (1988). Hazardous substances as defined under CERCLA comprise a list of approximately 1,000 individual chemicals. *See* 40 C.F.R. § 302.4 (1988), List of Hazardous Substances.

72. *See* RCRA, 42 U.S.C. § 6991(2) (1988). The term "petroleum" is defined as including crude oil or any fraction thereof that is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute). *Id.* § 6991(8). The term "regulated substance" includes but is not limited to petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons derived from crude oil through processes of separation, conversion, upgrading, and finishing, such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils. *Id.* § 6991(2).

73. Note that hazardous *waste* tanks regulated under RCRA are not regulated as USTs and are not subject to UST notification. *See* 40 C.F.R. §§ 264.190-.199 (1989).

74. *See* 42 U.S.C. § 6991(1) (1988).

75. *Id.* *See also* 40 C.F.R. § 280.12 (1990). The following are *not* regulated USTs:

- a. farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes;
- b. tank used for storing heating oil for consumptive use on the premises where

presence of such "excluded" tanks on a property would not subject the property to the Transfer Law.

In some circumstances, it may be necessary to hire an environmental consultant to investigate the facts surrounding the tank so that a determination can be made as to whether the tank is a UST (or indeed, whether any tanks are presently on the property).

b. What USTs are subject to notification?

Once it is determined that a UST, as defined by statute, is on the property it must be determined if the UST is subject to notification. Owners of regulated USTs were to report to state authorities by May 8, 1986 the existence of such USTs, specifying the age, size, type, location, and uses of any such tank.⁷⁶

The UST notification requirement applied not only to USTs currently in use (that is, as of May 8, 1986), but to USTs that were taken out-of-operation *after January 1, 1974*, but were *not* removed from the ground. Out-of-operation USTs that are still in the ground may be subject to the notification requirements, even though they are not currently subject to the substantive, technical UST regulations.⁷⁷ EPA regards the duty to notify as a continuing obligation of the tank owner.⁷⁸ In addition, any new UST brought into service after May 8, 1986 is subject to the notification requirements.

In sum, if there is any UST at the site that is subject to the UST notification requirement, the property is subject to the Transfer Law.

c. Who must submit notification?

The federal notification requirements provide generally that the *owner* of a UST, who may not be the owner of the property, is required to

stored;

- c. septic tank;
- d. pipeline facility (including gathering lines) . . . ;
- e. surface impoundment, pit, pond, or lagoon;
- f. storm water or wastewater collection system;
- g. flow-through process tank;
- h. liquid trap or associated gathering lines directly related to oil or gas production and gathering operations;
- i. storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

42 U.S.C. § 6991(1) (1988); 40 C.F.R. § 280.12 (1990).

76. 42 U.S.C. § 6991a(a) (1988); *see also* 40 C.F.R. § 280.22 (1990).

77. 42 U.S.C. § 6991 (1988); *see also* 40 C.F.R. § 280.12 (1990).

78. *See* 40 C.F.R. § 280.22 (1990).

notify IDEM.⁷⁹ For USTs taken out of operation *before* November 8, 1984 (the date the notification requirements under RCRA were adopted), the owner is the person who owned the UST immediately before use of the UST was discontinued.⁸⁰ For USTs in use on or after November 8, 1984, the owner is any person who owns a UST.⁸¹

The transferor may not be the owner of the tank, and thus may not be subject to the notification requirements. However, the Transfer Law applies to *property* that is the site of a UST subject to notification. Thus, investigation of USTs owned by current or prior lessees and prior owners may be necessary to determine if the *property* is subject to the Transfer Law.⁸²

3. *Is the Property the Site of a Facility That is Subject to Section 312 Community Right-to-Know Reporting?*—Property that contains a facility “subject to reporting under Section 312 of the federal Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11022),” is subject to the Transfer Law.⁸³

Section 312 establishes a complex scheme of reporting the storage, use, and manufacturing of so-called “hazardous chemicals.”⁸⁴ If such “hazardous chemicals” are present in certain quantities at a facility, the owner or operator of the facility is subject to Section 312 reporting.⁸⁵ Thus, the first step in determining the applicability of Section 312 is determining whether such “hazardous chemicals” are present at the property.

The term “hazardous chemicals” is defined generally by what constitutes a “hazardous chemical” under OSHA’s Hazard Communication Standard⁸⁶ and by the “extremely hazardous substances” found in a

79. *Id.*

80. *See id.*

81. *Id.* § 280.12.

82. If the investigation under the Transfer Law finds that there are USTs at the property but the USTs are not in compliance with the notification requirements, notification forms can be filed now. *See* 53 Fed. Reg. 37,199 (1988). Owners who knowingly fail to notify or who submit false information may be subject to civil penalties of up to \$10,000 per UST. 42 U.S.C. § 6991(e), (d)(1) (1988); *see also* IND. CODE § 13-7-20-27(a) (1988).

Note also that the Transfer Law’s Disclosure Document requests information regarding any underground storage tanks that “are or were used by the transferor,” *id.* § 13-7-22.5-15 (Supp. 1990) (Part III A, 4 of Disclosure Form), and whether the transferor has knowledge of USTs that “existed under prior ownerships,” *id.* (Part III B.2 of the Disclosure Form). Because the Disclosure Document must be filed with IDEM, if it reveals USTs for which notifications were not filed, IDEM may pursue the transferor, the transferee, or prior owners for failure to notify.

83. IND. CODE § 13-7-22.5-6(2) (Supp. 1990).

84. 42 U.S.C. § 11022 (1988); *see also* 40 C.F.R. § 370 (1989).

85. 42 U.S.C. § 11022 (1988); *see also* 40 C.F.R. § 370 (1989).

86. *See* 29 C.F.R. § 1910.1200 (1990).

separate list of chemicals that was developed under Section 311 of the Community-Right-to-Know Act.⁸⁷ Unfortunately, there is no comprehensive "list" of OSHA hazardous chemicals. Instead, the OSHA standard relies on a narrative definition that requires each employer⁸⁸ to evaluate on a case-by-case basis the chemicals present in the workplace. It has been estimated that there may be over 500,000 hazardous chemicals under the OSHA definition.

Hazardous chemicals under this OSHA program include chemicals that constitute "physical hazards" and "health hazards."⁸⁹ Physical hazards include combustible and flammable materials, compressed gases, and explosives.⁹⁰ Health hazards are chemicals for which there is scientific evidence of acute or chronic health effects, such as carcinogens.⁹¹ The OSHA standard excludes various substances from the definition of hazardous chemical, such as tobacco, food, drugs, cosmetics, alcoholic beverages, and consumer products.⁹²

Under Section 312, Congress also excluded additional substances from the scope of "hazardous chemicals," including substances used in research laboratories and hospitals, agricultural products, and consumer products packaged as they would be for distribution to the general public.⁹³

If a facility is subject to Section 312 reporting requirements because of the use of a hazardous chemical, the owner or operator must submit the following to the State Emergency Response Commission, the Local Emergency Planning Committee, and local fire department: (1) On a one-time basis, a copy of each MSDS or a list of MSDSs;⁹⁴ and (2) an annual inventory form covering hazardous chemicals and also "extremely hazardous substances."⁹⁵

87. 40 C.F.R. § 355 (1989).

88. The Occupational Safety & Health Act (OSH Act) defines an employer as a "person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State." See 29 U.S.C. § 652(6) (1988). The Occupational Safety & Health Administration (OSHA) has issued regulations to clarify the scope of this definition. See 29 C.F.R. pt. 1975 (1990). "Any employer employing one or more employees" is considered an employer subject to the OSH Act. *Id.* § 1975.4(a). Professionals who have employees, agricultural employers, Indians and Indian tribes, and nonprofit and charitable organizations are all covered employers under the OSH Act. *Id.* § 1975.4(b). In addition, OSHA requires each state with an OSHA-approved state plan to regulate state and local government employers in the same way as other employers. Indiana has such an OSHA plan.

89. 29 C.F.R. § 1910.1200(c) (1990).

90. *Id.*

91. *Id.* Appendices A and B of the Hazard Communication Standard give additional guidance in determining whether a particular chemical is a hazardous chemical.

92. *Id.* § 1910.1200(b)(6); see also *id.* § 1910.1200(c).

93. 42 U.S.C. § 11021(e) (1988); see also 40 C.F.R. § 370.2 (1989).

94. Manufacturers were required to comply with the one-time submission by October 17, 1987; nonmanufacturers were to comply by September 24, 1988.

95. See 42 U.S.C. § 11022(c) (1988); 40 C.F.R. § 370 (1989). Manufacturers were

The EPA has authority to establish reporting thresholds for Section 312 reporting.⁹⁶ Currently, the Section 312 reporting requirements apply only to facilities that use hazardous chemicals or extremely hazardous substances in relatively large quantities.⁹⁷ The facilities subject to the Section 312 reporting requirements are those which use

- (a) hazardous chemicals in quantities greater than or equal to 10,000 pounds, or
- (b) extremely hazardous substances in quantities greater than or equal to 500 pounds (or 55 gallons), or in quantities greater than the "threshold planning quantity" established for that substance at 40 C.F.R. Part 355, Appendix A, whichever is less.⁹⁸

The quantity of chemicals present must be below the threshold *at all times* for the facility to be excluded from reporting. Thus, for example, chlorine may never be present in excess of 100 pounds, the threshold planning quantity for chlorine. If chlorine is present in quantities greater than 100 pounds, the facility may be subject to Section 312 reporting.

A determination of the applicability of the Hazard Communication Program and the Section 312 reporting requirements can be quite time-consuming and complex. It may be necessary to hire an environmental consultant or industrial hygienist to determine if hazardous chemicals are present at the facility.

4. Has the Property Been Released from Financial Assurance Requirements?—Even if the property appears to be subject to the Transfer Law because it is on the CERCLIS list, it is the site of USTs subject to notification, or it contains a facility subject to Section 312 reporting, the release of applicable financial assurance requirements will exclude the property from the requirements of the Transfer Law.⁹⁹ Financial assurance or bonding requirements are included in the environmental regulatory programs for hazardous waste treatment, storage, disposal facilities,¹⁰⁰ underground storage tanks,¹⁰¹ and surface coal mining.¹⁰² The Transfer Law does not specifically limit the bonding or financial assurance me-

required to comply beginning on March 1, 1988, and annually thereafter; nonmanufacturers were required to comply beginning on March 1, 1989, and annually thereafter. Covered facilities must be determined in accordance with the reporting thresholds.

96. See 42 U.S.C. 11022(b) (1988).

97. 40 C.F.R. § 370 (1989).

98. See generally 40 C.F.R. § 370.20(b) (1990).

99. IND. CODE § 13-7-22.5-6 (Supp. 1990).

100. See 40 C.F.R. §§ 264.144-.145 (1990).

101. IND. ADMIN. CODE tit. 329, r. 2-12 (Supp. 1990); see also IND. CODE §§ 13-7-20-14, -15 (1988).

102. IND. CODE §§ 13-4.1-6-1 to -9 (1988).

chanisms to those intended to provide funds for environmental impairments; however, that interpretation would seem to be consistent with the intent of the Transfer Law. Because some of the financial assurance requirements extend long after the activities at the facility cease, through a period of post-closure care, these requirements may not have an impact on the majority of transfers in the next few years.

The intention behind this provision of the Transfer Law appears to be that if financial assurances have been released, the property no longer poses an environmental threat. This conclusion should not be assumed, particularly if the financial assurance applied only to part of the property, for example, an underground storage tank. Other parts of the property may still pose an environmental concern. Thus, even though the property may not be subject to the Transfer Law, a thorough environmental audit is likely to be appropriate.

III. IMPACT OF TRANSFER LAW ON PARTIES' ENVIRONMENTAL LAW LIABILITIES

Although buyers' and sellers' liabilities for the environmental condition of the transfer property could be the subject of another article, a brief discussion of such liability is helpful to put the Transfer Law in perspective.

Prior to the Transfer Law, sellers of Indiana real estate had no legal obligation to investigate or disclose to buyers the environmental conditions on their property. This was known as the common law doctrine of *caveat emptor* — let the buyer beware of the property's condition.¹⁰³ Now, the seller has a statutory obligation under the Transfer Law to investigate certain environmental matters related to the property and to disclose such information regarding the environmental activities at the property.¹⁰⁴

With regard to the buyer's environmental liabilities, the amended Transfer Law requires the Disclosure Document to carry the following warning:

A WARNING TO THE PARTIES TO A TRANSFER OF PROPERTY: It is highly unlikely that the single act of reading this document would be found to constitute "all appropriate inquiry into the previous ownership and uses of the property" so as to protect you against liability under the "innocent purchaser" provision of the federal Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. 9601(35)(B) ("Superfund"). You are strongly encouraged not only to read this document

103. See generally *Anderson Drive-in Theatre, Inc. v. Kirkpatrick*, 123 Ind. App. 388, 110 N.E.2d 506 (1953).

104. See *supra* notes 29-34 and accompanying text.

carefully but also to take all other actions necessary to the exercise of due diligence in your inquiry into the previous ownership and uses of the property.¹⁰⁵

This warning emphasizes that the buyer's qualifying for the "innocent landowner defense" under Superfund¹⁰⁶ is likely to require more than simply reviewing the Disclosure Document provided by the seller. Briefly summarized (and overly simplified), the innocent landowner defense is available to the buyer if the buyer can establish that:

- (i) the facility was acquired after the hazardous substances were placed at the property;
- (ii) at the time of acquisition, the buyer had no reason to know of the hazardous substances at the property; and
- (iii) prior to acquisition, the buyer had made all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize buyer's environmental liability.

As a general rule, the "good commercial or customary practice" for environmental audits is to seek more information than is provided in the Transfer Law's Disclosure Document.¹⁰⁷ An environmental audit might involve, for example, a search of the public environmental records relevant to the property, a review of aerial photographs of the property, and an on-site inspection. In some instances, sampling the soil or groundwater at the property for contamination might also be appropriate.

In sum, if the buyer limits its environmental audit to examining only the Disclosure Document provided under the Transfer Law, such environmental audit generally will not qualify as an audit of "good commercial or customary practice." Thus, what constitutes an appropriate environmental audit to preserve the buyer's innocent landowner defense under Superfund should be evaluated as a matter distinct from the parties' compliance with the Transfer Law.

105. IND. CODE § 13-7-22.5-15 (Supp. 1990).

106. See 42 U.S.C. § 9607(b) (1990).

107. See, e.g., *United States v. Serafini*, 711 F. Supp. 197 (M.D. Pa. 1988); *Wickland Oil Terminals v. ASARCO, Inc.*, 15 Chem. Waste Lit. Rep. 1255 (N.D. Cal. 1988).

Appendix A

A WARNING TO THE PARTIES TO A TRANSFER OF PROPERTY: It is highly unlikely that the single act of reading this document would be found to constitute "all appropriate inquiry into the previous ownership and uses of the property" so as to protect you against liability under the "innocent purchaser" provision of the federal Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601(35)(B). You are strongly encouraged not only to read this document carefully but also to take all other actions necessary to the exercise of due diligence in your inquiry into the previous ownership and uses of the property.

ENVIRONMENTAL DISCLOSURE DOCUMENT FOR TRANSFER OF REAL PROPERTY

The following information is provided under IC 13-7-22.5, the Responsible Property Transfer Law.	<u>For Use By County Recorder's Office</u>
	County _____
	Date _____
	Doc. No. _____
	Vol. _____
	Page _____ Rec'd by: _____

I. PROPERTY IDENTIFICATION

A. Address of property: _____
Street

City or Town Township

Tax Parcel Identification No. (Key Number): _____

B. Legal Description:
Section _____ Township _____ Range _____
Enter or attach complete legal description in this area:

LIABILITY DISCLOSURE

Transferrors and transferees of real property are advised that their ownership or other control of such property may render them liable for environmental cleanup costs whether or not they caused or contributed to the presence of environmental problems in association with the property.

C. Property Characteristics:

Lot Size _____ Acreage _____

Check all types of improvement and uses that pertain to the property:

- ☐ Apartment building (6 units or less)
- ☐ Commercial apartment (over 6 units)
- ☐ Store, office, commercial building
- ☐ Industrial building
- ☐ Farm, with buildings
- ☐ Other (specify) _____

II. NATURE OF TRANSFER

- | | Yes | No |
|---|--------------------------|--------------------------|
| A. (1) Is this a transfer by deed or other instrument of conveyance of fee title to property? | <input type="checkbox"/> | <input type="checkbox"/> |
| (2) Is this a transfer by assignment of over 25% of beneficial interest of a land trust? | <input type="checkbox"/> | <input type="checkbox"/> |
| (3) A lease exceeding a term of 40 years? | <input type="checkbox"/> | <input type="checkbox"/> |
| (4) A collateral assignment of beneficial interest? | <input type="checkbox"/> | <input type="checkbox"/> |
| (5) An installment contract for the sale of property? | <input type="checkbox"/> | <input type="checkbox"/> |
| (6) A mortgage or trust deed? | <input type="checkbox"/> | <input type="checkbox"/> |
| (7) A lease of any duration that includes an option to purchase? | <input type="checkbox"/> | <input type="checkbox"/> |

B. (1) Identify Transferor:

Name and Current Address of Transferor

Trust No.
Name and Address of Trustee if this is a transfer of beneficial interest of a land trust.

(2) Identify person who has completed this form on behalf of the Transferor and who has knowledge of the information contained in this form:

Name, Position (if any), and address Telephone No.

C. Identify Transferee:

Name and current address of Transferee

III. ENVIRONMENTAL INFORMATION

A. Regulatory Information During Current Ownership

1. Has the transferor ever conducted operations on the property which involved the generation, manufacture, processing, transportation, treatment, storage, or handling of "hazardous substance," as defined by IC 13-7-8.7-1? This question does not apply to consumer goods stored or handled by a retailer in the same form and approximate amount, concentration, and manner as they are sold to consumers, unless the retailer has engaged in any commercial mixing (other than paint mixing or tinting of consumer sized containers), finishing, refinishing, servicing, or cleaning operations on the property.

☐ Yes ☐ No

2. Has the transferor ever conducted operations on the property which involved the processing, storage, or handling of petroleum, other than that which was associated directly with the transferor's vehicle usage?

☐ Yes ☐ No

3. Has the transferor ever conducted operations on the property which involved the generation, transportation, storage, treatment, or disposal of "hazardous waste," as defined in IC 13-7-1?

☐ Yes ☐ No

4. Are there any of the following specific units (operating or closed) at the property that are used or were used by the transferor to manage hazardous wastes, hazardous substances, or petroleum?

	Yes	No
Landfill	<input type="checkbox"/>	<input type="checkbox"/>
Surface Impoundment	<input type="checkbox"/>	<input type="checkbox"/>
Land Application	<input type="checkbox"/>	<input type="checkbox"/>
Waste Pile	<input type="checkbox"/>	<input type="checkbox"/>
Incinerator	<input type="checkbox"/>	<input type="checkbox"/>
Storage Tank (Above Ground)	<input type="checkbox"/>	<input type="checkbox"/>
Storage Tank (Underground)	<input type="checkbox"/>	<input type="checkbox"/>
Container Storage Area	<input type="checkbox"/>	<input type="checkbox"/>
Injection Wells	<input type="checkbox"/>	<input type="checkbox"/>
Wastewater Treatment Units	<input type="checkbox"/>	<input type="checkbox"/>
Septic Tanks	<input type="checkbox"/>	<input type="checkbox"/>
Transfer Stations	<input type="checkbox"/>	<input type="checkbox"/>
Waste Recycling Operations	<input type="checkbox"/>	<input type="checkbox"/>
Waste Treatment Detoxification	<input type="checkbox"/>	<input type="checkbox"/>
Other Land Disposal Area	<input type="checkbox"/>	<input type="checkbox"/>

If there are "YES" answers to any of the above items and the transfer of property that requires the filing of this document is other than a mortgage or trust deed or collateral assignment of beneficial interest in a land trust, you must attach to the copies of this document that you file with the county recorder and the department of environmental management a site plan that identifies the location of each unit.

5. Has the transferor ever held any of the following in regard to this real property?

(A) Permits for discharges of wastewater to waters of Indiana.

☐ Yes ☐ No

(B) Permits for emissions to the atmosphere.

☐ Yes ☐ No

(C) Permits for any waste storage, waste treatment, or waste disposal operation.

☐ Yes ☐ No

6. Has the transferor ever discharged any wastewater (other than sewage) to a publicly owner treatment works?

☐ Yes ☐ No

7. Has the transferor been required to take any of the following actions relative to this property?

(A) Filed an emergency and hazardous chemical inventory form pursuant to the federal Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11022).

☐ Yes ☐ No

(B) Filed a toxic chemical release form pursuant to the federal Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11023).

☐ Yes ☐ No

8. Has the transferor or any facility on the property or the property been the subject of any of the following state or federal governmental actions?

(A) Written notification regarding known, suspected, or alleged contamination on or emanating from the property.

☐ Yes ☐ No

(B) Filing an environmental enforcement case with a court or the solid waste management board for which a final order or consent decree was entered.

☐ Yes ☐ No

(C) If the answer to question (B) was Yes, then indicate whether or not the final order or decree is still in effect for this property.

☐ Yes ☐ No

9. Environmental Releases During Transferor's Ownership.

(A) Has any situation occurred at this site which resulted in a reportable "release" of any hazardous substances or petroleum as required under state or federal laws?

☐ Yes ☐ No

(B) Have any hazardous substances or petroleum which were released come into direct contact with the ground at this site?

☐ Yes ☐ No

If the answer to question (A) or (B) is Yes, have any of the following actions or events been associated with a release on the property?

☐ Use of a cleanup contractor to remove or treat materials including soils, pavement, or other surficial materials?

☐ Assignment of in-house maintenance staff to remove or treat materials including soils, pavement, or other surficial materials?

☐ Sampling and analysis of soils?

☐ Temporary or more long term monitoring of groundwater at or near the site?

☐ Impaired usage of an onsite or nearby water well because of offensive characteristics of the water?

☐ Coping with fumes from subsurface storm drains or inside basements?

☐ Signs of substances leaching out of the ground along the base of slopes or at other low points on or immediately adjacent to the site?

(C) Is there an environmental defect (as defined in IC 13-7-22.5-1.5) on the property that is not reported under question (A) or (B)?

☐ Yes ☐ No

If the answer is Yes, describe the environmental defect: _____

10. Is the facility currently operating under a variance granted by the commissioner of the Indiana department of environmental management?

☐ Yes ☐ No

11. Has the transferor ever conducted an activity on the site without obtaining a permit from the U.S. Environmental Protection Agency, the commissioner of the department of environmental management, or another administrative agency or authority with responsibility for the protection of the environment, when such a permit was required by law?

☐ Yes ☐ No

If the answer is Yes, describe the activity: _____

12. Is there any explanation needed for clarification of any of the above answers or responses?

B. Site Information Under Other Ownership or Operation

1. Provide the following information about the previous owner or about any entity or person to whom the transferor leased the property or with whom the transferor contracted for the management of the property:

Name: _____

Type of business _____

or property usage _____

2. If the transferor has knowledge, indicate whether the following existed under prior ownerships, leaseholds granted by the transferor, or other contracts for management or use of the property:

	Yes	No
Landfill	<input type="checkbox"/>	<input type="checkbox"/>
Surface Impoundment	<input type="checkbox"/>	<input type="checkbox"/>
Land Application	<input type="checkbox"/>	<input type="checkbox"/>
Waste Pile	<input type="checkbox"/>	<input type="checkbox"/>
Incinerator	<input type="checkbox"/>	<input type="checkbox"/>
Storage Tank (Above Ground)	<input type="checkbox"/>	<input type="checkbox"/>
Storage Tank (Underground)	<input type="checkbox"/>	<input type="checkbox"/>
Container Storage Area	<input type="checkbox"/>	<input type="checkbox"/>
Injection Wells	<input type="checkbox"/>	<input type="checkbox"/>
Wastewater Treatment Units	<input type="checkbox"/>	<input type="checkbox"/>
Septic Tanks	<input type="checkbox"/>	<input type="checkbox"/>
Transfer Stations	<input type="checkbox"/>	<input type="checkbox"/>
Waste Recycling Operations	<input type="checkbox"/>	<input type="checkbox"/>
Waste Treatment Detoxification	<input type="checkbox"/>	<input type="checkbox"/>
Other Land Disposal Area	<input type="checkbox"/>	<input type="checkbox"/>

IV. CERTIFICATION

A. Based on my inquiry of those persons directly responsible for gathering the information, I certify that the information submitted is, to the best of my knowledge and belief, true and accurate.

TRANSFEROR (or on behalf of Transferor)

B. This form was delivered to me with all elements completed on _____, 19__

TRANSFeree (or on behalf of Transferee)

The Evolution of Indiana Environmental Law: A View Toward the Future

ROBERT F. BLOMQUIST*

I. INTRODUCTION

1989-90 has been a watershed in the evolution¹ of environmental law in Indiana. The Indiana legislature, assisted by the vigorous leadership of Governor Evan Bayh,² and the Indiana judiciary, crafted significant new environmental laws during 1989-90. These legal innovations are rooted in common law tort principles moderately protective of environmental interests,³ but shaped by more recent statutory enactments addressing general environmental policy concerns.⁴ In addition, some federal courts resolved Indiana environmental disputes by reaching decisions that applied both Indiana law and federal law.

A plethora of federal environmental laws⁵ and rapidly changing

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1. This evolution can be viewed as both a species of broad-based cultural evolution as well as a particular instance of legal evolution whereby modern societies respond to pressures of growth, development, and technology with more comprehensive and stringent environmental regulation. *See generally* J. BRONOWSKI, *THE ASCENT OF MAN* (1973). *See also* W. RODGERS, JR., 1 *ENVIRONMENTAL LAW: AIR AND WATER* at v. (1986) (the concept of evolution "tends to surface regularly, probably because the facts, players, policies, rules, and strategies [of environmental regulation] invariably drift and move when plotted over time") [hereinafter RODGERS].

2. Governor Bayh's key environmental policy advisors are Barton R. Peterson, Executive Assistant to the Governor, and Kathy Prosser, Commissioner of the Indiana Department of Environmental Management. I gratefully acknowledge their assistance in providing background information for this Article.

3. *See generally* *Erbich Products Co. Inc. v. Wills*, 509 N.E.2d 850 (Ind. Ct. App. 1987) (although ultra-hazardous activity could give rise to strict liability, the storage of chlorine in and of itself is not an ultra-hazardous activity that would give rise to strict liability for its release into the environment, resulting in personal injury and property damage, because the challenged activity could be carried out in a safe manner).

4. *See, e.g.*, IND. CODE § 13-7-4-1 (Supp. 1990) (prohibiting discharges, contamination, or deposit of contaminants); *id.* § 34-1-52-1 (1988) (nuisance); *id.* § 13-7-22.5 (1988) (responsible property transfer law).

5. A list of key federal environmental statutes enacted since 1970 includes the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(a) (1988); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988), *as amended by* Act of 1977, Pub. L. No. 95-95; Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1988), *as amended by* the Clean Water Act of 1977, Pub. L. No. 95-217; Noise Control Act of 1972, 42 U.S.C. §§ 4901-31 (1988), *as amended by* The Quiet Communities Act of 1978, Pub. L. No. 95-

demographic and economic trends⁶ prodded jurists and policymakers addressing Indiana environmental issues to encounter what Professor William H. Rodgers, Jr. calls a "spectacle of ever-burgeoning regulation" of things environmental.⁷ The result was a remarkable output of Indiana environmental laws — statutory, case law, and regulatory — during the past year. Indeed, as suggested later in this Article, Indiana's recent environmental lawmaking activity is likely to produce further legal changes during the remainder of the decade and into the next century as the current legal regime "produces its own dissatisfactions, gives rise to new 'gaps' to be filled, and creates its own demands for more regulation."⁸

This Article is divided into three major parts. The first section scrutinizes key state environmental legislative enactments during the survey period. In light of the unusual output of environmental statutes during 1989-90, I devote considerable space to an analysis of key legislative provisions. The second section analyzes state judicial decisions interpreting Indiana environmental and natural resources law and federal court opinions addressing specific Indiana environmental disputes. Finally, the Article concludes by providing a view of probable future trends and developments in Indiana environmental law.⁹

II. KEY INDIANA ENVIRONMENTAL LEGISLATION, 1989-90

Indiana's 1990 Second Regular Session of the 106th General Assembly enacted several major bills pertaining to the environment. The General Assembly also generated a variety of less important environmental sta-

609; Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6991 (1988); Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601-2629 (1988); Federal Insecticide, Fungicide, and Rodenticide Act of 1977, 7 U.S.C. §§ 136-136y (1988); Safe Drinking Water Amendments of 1977, 42 U.S.C. §§ 300f-300j-10 (1988); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988), *as amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. 96-510, Pub. L. No. 99-962.

6. See generally INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, THE PROTECTION OF INDIANA'S GROUNDWATER: STRATEGY AND DRAFT IMPLEMENTATION PLAN (1987); INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, WHAT ARE INDIANA'S PLANS FOR MANAGEMENT OF SOLID AND HAZARDOUS WASTE IN THE 1990s?: A DISCUSSION DOCUMENT (July 1988) (detailing Indiana population trends, solid waste landfill capacity projections, and industry waste management trends); INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, 1986 ANNUAL REPORT.

7. Blomquist, *The Beauty of Complexity* (Book Review), 39 HAST L.J. 555, 568 (1988) (quoting RODGERS *supra* note 1, § 1.3, at 17).

8. *Id.* See generally S. 82, 107th Gen. Assembly Sess. (1991) (recycling by government bodies); S. 276, 107th Gen. Assembly Sess. (1991) (recycling/remanufacturing income tax credits).

9. Environmental rulemaking, a critical aspect of developing environmental law in Indiana, is beyond the scope of this Article. Similarly, the details of significant legislative changes in environmental regulations of property transfers is beyond the scope of this Article.

tutes. The legislation addressed six subject areas: solid waste planning, management, and recycling; pollution prevention; underground storage tanks; natural resources; water pollution; and pesticides regulation. Because recent legislative developments placed great emphasis on solid waste planning, management, and recycling policy, a substantial portion of the Article discusses these issues in considerable detail.

A. Solid Waste Planning, Management, and Recycling

Public Law No. 10-1990¹⁰ (the "Act") revolutionizes solid waste planning in Indiana. The Act consists of five major policy themes: (1) instituting mandatory solid waste planning; (2) establishing new and complex local governmental entities known as "county solid waste management districts" and "joint solid waste management districts" with extensive powers and responsibilities; (3) providing a variety of governmental tools to finance solid waste planning, management, and recycling activities; (4) promoting recycled product use and discouraging waste production; and (5) regulating solid waste transportation by imposing certification and reporting requirements on waste haulers.¹¹

1. State and Regional Solid Waste Planning. —

a. General state policies and goals

In Indiana Code section 13-9.5-11, the Act¹² articulates broad statewide policy principles and goals relating to solid waste. Initially, the legislature indicated a policy preference for source reduction, recycling,

10. Indiana House Enrolled Act No. 1240, Pub. L. No. 10-1990 (amending IND. CODE § 13-7-1-1 (1988 & Supp. 1990)) [hereinafter the Act]. Section 17 of the Act (adding a new article, Indiana Code § 13-9.5) defines key terminology for solid waste planning. "Landfill" is defined as "a solid waste management disposal facility at which solid waste is deposited on or in the ground as an intended place of final location," but does not include "[a] site that is devoted solely to receiving . . . [f]ill dirt [or] [v]egetative matter subject to disposal as a result of landscaping, yard maintenance, land clearing, or any combination [thereof]." IND. CODE § 13-9.5-1-19 (Supp. 1990).

"Recycling" refers to "a process by which materials that would otherwise become solid waste are collected, separated or processed, and converted into materials or products for reuse or sale." *Id.* § 13-9.5-1-24.

"Solid waste" tracks the existing definitions of Indiana Code § 13-17-1-22 except that the Act excepts from the definition waste regulated under Indiana Code § 13-7-8-5 and "[a]ny infectious waste (as defined in IC 16-1-9.7-3) that is disposed of at an incinerator permitted under rules adopted by the solid waste management board to dispose of infectious waste." *Id.* § 13-9.5-1-26.

"Source reduction" refers to "a reduction in the amount of solid waste generated that is achieved through action affecting the source of the solid waste." *Id.* § 13-9.5-30.

11. *Id.* §§ 13-9.5-1-2 to -11-5.

12. *Id.* § 13-9.5-11 (amending IND. CODE § 13-7-1-1 (1988 & Supp. 1990)).

and other solid waste management alternatives over incineration and landfill disposal as solid waste management methods.¹³ To implement this preference for solid waste management, the Act set the goal of reducing the amount of solid waste incinerated and disposed of in Indiana by thirty-five percent before January 1, 1996; and by fifty percent before January 1, 2001.¹⁴

b. State solid waste planning

The Act also establishes state solid waste planning responsibilities.¹⁵ Two state entities are to be involved with these duties: the Indiana Department of Environmental Management (IDEM)¹⁶ and the state Environmental Policy Commission.¹⁷ The legislation envisions a four-step

13. *Id.*

14. *Id.* Cf. Regional Note, *The 1988 Pennsylvania Municipal Waste Planning, Recycling, and Waste Reduction Act*, 9 TEMPLE ENVIR. & TECH. L. REV. 107, 110, 113-14 (1990) (describing other states' recycling and waste reduction goals) [hereinafter Regional Note]. For example:

The Pennsylvania [legislation] calls for twenty-five percent recycling of the state's solid waste stream by 1997. [53 PA. CONS. STAT. ANN. § 4000.102(c)(1) (Purdon 1989)]. By comparison, Florida's law calls for a thirty percent recycling by 1994 [FLA. STAT. ANN. § 403.706(4) (West 1989)]; Maryland's law seeks twenty percent recycling by 1994 [MD. ENVTL. CODE ANN. § 9-505(18) (1989)]; Connecticut's mandatory recycling goal is twenty-five percent recycling by 1991 [1987 Conn. Pub. Acts 87-544, § 1 (Reg. Sess.)].

Id. at 113-14 (footnotes omitted).

15. Indiana House Enrolled Act No. 1240, Pub. L. No. 10-1990, § 17 (adding a new article, IND. CODE § 13-9.5 (Supp. 1990)).

16. The Indiana Chamber of Commerce described IDEM's purpose: This department, established as a result of General Assembly action in 1985, administers the Environmental Management Act and other state environmental statutes previously carried out by the Indiana State Board of Health. It cooperates with the U.S. Environmental Protection Agency and is responsible for implementing state programs concerning water and air pollution control, solid waste management, and low-level radioactive waste.

INDIANA CHAMBER OF COMMERCE, HERE IS YOUR INDIANA GOVERNMENT 25 (1987).

17. The Chamber of Commerce also stated the purpose of the State Environmental Policy Commission:

This commission was created by the Indiana General Assembly in 1985 to provide ongoing evaluation of Indiana's environmental program. It makes reports and legislative recommendations for the governor, the commissioner of the Department of Environmental Management and General Assembly.

The commission is composed of 12 members. The Speaker of the House and the president pro tempore of the Senate each appoint four legislators, not more than two from the same political party, and the governor appoints four members representing environmental and economic interests, not more than two from the same political party.

Id. at 26.

process of interaction between these two entities. First, the IDEM is required to submit to the Environmental Policy Commission a draft of a state solid waste management plan.¹⁸ Second, the Environmental Policy Commission must revise the IDEM draft plan to assure a twenty-year state solid waste management plan covering four key planning components. The twenty-year plan must establish in order of priority: (1) voluntary statewide goals for source reduction; (2) criteria for alternatives to final disposal, including recycling, composting, and the availability of markets; (3) general criteria for the siting, construction, operation, closing, and monitoring of final disposal facilities; (4) criteria and other elements to be considered in the adoption of district solid waste management plans.¹⁹

After receiving the Environmental Policy Commission revisions, the IDEM commissioner must adopt the state plan in final form and provide for its implementation by rules adopted under Indiana Code section 4-22-2.²⁰ Finally, the process of statewide solid waste management planning comes full circle. The Act mandates that after the IDEM commissioner adopts the state plan, the Environmental Policy Commission must review it every five years,²¹ using the earlier three steps of interaction with the IDEM.²²

c. Regional solid waste planning

Indiana Code section 13-9.5-4²³ — consisting of many detailed requirements — places the most important and palpable planning responsibilities on solid waste management districts.²⁴ Each district must adopt and submit to the IDEM commissioner for approval its own solid waste management plan that meets a variety of specific technical and procedural criteria.²⁵ The most important requirements for district solid waste management plans include: public meeting prerequisites; format standards;

18. IND. CODE § 13-9.5-3-1 (Supp. 1990).

19. *Id.* § 13-9.5-3-3. "Final disposal facility" is defined as: "(1) A landfill; (2) an incinerator; or (3) a waste-to-energy facility" but not including "a transfer station." *Id.* § 13-9.5-1-14. Moreover, the Act requires IDEM to supply a model format to be used in preparing district solid waste plans. *Id.* § 13-9.5-4-2(c).

Another section allows the Environmental Policy Commission to go beyond the minimum plan requirements to "make other revisions [to the state plan] that are not inconsistent with [Chapter 3]." *Id.* § 13-9.5-3-1(2).

20. IND. CODE § 13-9.5-3-2 (Supp. 1990). The Code authorizes the state Solid Waste Management Board to adopt rules on solid waste. *Id.* § 13-1-12-8(a) (1988).

21. *Id.* § 13-9.5-3-4 (Supp. 1990).

22. One additional requirement for future revisions of the state plan is that they must be developed with the advice of the solid waste planning advisory council. *Id.*

23. *Id.* § 13-9.5-4.

24. See *infra* notes 25-41 and accompanying text.

25. IND. CODE § 13-9.5-4-1 (Supp. 1990).

long-range demographic projections for the district;²⁶ descriptions of the origin, content, and weight or volume of the solid waste to be generated in the district at the time the district plan is developed, and projections of the origin, content, and weight or volume of the solid waste expected to be generated in the district in the next five years, ten years, and twenty years;²⁷ and a solid waste facility's inventory and needs projection.²⁸

The Act also mandates certain procedural requirements to be followed in district solid waste management plans.²⁹ Each district must integrate its approach to solid waste management with a thorough and balanced consideration of "[s]ource reduction"; "[a]lternatives to complete or partial dependence on final disposal facilities, including recycling and composting"; and, alternatives to "[f]inal disposal facilities," like landfills and incinerators.³⁰ Furthermore, district solid waste management plans must articulate goals and objectives;³¹ consider alternate means of achieving district goals;³² describe projected operational and capital costs; propose a means of financing the implementation of the district plan;³³ and provide for "surveillance and enforcement procedures" needed for implementation.³⁴

Prevailing dormant Commerce Clause precedent prohibits a state from banning the importation of waste from another state.³⁵ Thus, a potentially vulnerable provision of the Act is section 13-9.5-4-8. This section allows a district plan "to the extent it is constitutionally permissible [to] include provisions to restrict or prohibit the disposal within the district of solid waste originating from another state if the district reasonably considers the provisions necessary to accomplish the long-range planning goals of the district."³⁶ Although the statutory predicate of an out-of-state ban requires the ban to be constitutional, the legislature

26. *Id.* § 13-9.5-4-8(1). A district plan must include: "(1) The results of a demographic study of the district predicting the population of the district five (5) years, ten (10) years, and twenty (20) years after the year the district plan is adopted." *Id.*

27. *Id.* § 13-9.5-4-5(2).

28. *Id.* §§ 13-9.5-4-5(3), -5(5).

29. For a general discussion of the importance of process values in environmental law and policy, see Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337 (1988).

30. IND. CODE § 13-9.5-4-6 (Supp. 1990).

31. *Id.* § 13-9.5-4-7(1).

32. *Id.* § 13-9.5-4-7(2).

33. *Id.* § 13-9.5-4-7(3).

34. *Id.* § 13-9.5-4-7(6).

35. See generally Note, *Hazardous Waste in Interstate Commerce: Minimizing the Problem after City of Philadelphia v. New Jersey*, 24 VAL. U.L. REV. 77 (1989).

36. IND. CODE § 13-9.5-4-8 (Supp. 1990).

implicitly suggests that districts consider experimentation with such bans. This, in turn, is likely to trigger litigation by out-of-state generators and transporters challenging the district bans.³⁷

A district must "reconsider and, if appropriate, amend its solid waste management plan at least once every five . . . years"³⁸ by following the substantive and procedural requirements applicable to initial plans.³⁹ If a district fails to submit a proper district plan — either by failing to submit any plan at all or by submitting a deficient revised plan after receiving written comments from the IDEM commissioner on changes required to make the district plan acceptable⁴⁰ — the IDEM commissioner adopts a solid waste management plan for the district.⁴¹

2. *New, Complicated and Powerful Local Governmental Entities.* —

a. *Types of solid waste management districts*

The Act⁴² places the burden on each of Indiana's ninety-two counties,⁴³ on or before July 1, 1991, to either (a) "[j]oin with one . . . or more other counties in establishing a joint solid waste management district

37. See, e.g., *Government Suppliers Consolidating Serv., Inc. v. Bayh*, 734 F. Supp. 853 (S.D. Ind. 1990) (Out-of-state companies engaged in the business of hauling solid waste by truck to permanent disposal sites brought an action challenging an Indiana law imposing certain requirements on haulers who dumped solid waste in landfills located in Indiana. On the companies' motion for temporary restraining order, converted into a motion for preliminary injunction, the court held that although the companies were not entitled to a preliminary injunction against the statutory provision imposing an allegedly discriminatory tipping fee on trash dumped in Indiana landfills, and the companies were not entitled to a preliminary injunction against the provision requiring haulers to certify from where the largest part of the solid waste was generated, companies were entitled to a preliminary injunction against the requirement that a health officer from the foreign state generating the waste certify that the waste contains no hazardous or infectious waste.). See also *Government Suppliers Consolidating Serv., Inc. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990) (out-of-state certification requirement and tipping fees held unconstitutional as a violation of interstate commerce).

38. IND. CODE § 13-9.5-4-11(a) (Supp. 1990).

39. See *supra* notes 23-34 and accompanying text.

40. IND. CODE § 13-9.5-4-3(c) (Supp. 1990).

41. *Id.* § 13-9.5-4-10.

42. *Id.* § 13-9.5-2.

43. *Query*: Given the present practice of municipal collection and transport of a significant portion of nonhazardous solid waste, would it not have made more policy sense for the legislature to have crafted an approach similar to Pennsylvania's recent solid waste legislation which requires that all of the state's municipalities pass recycling legislation or face uniform state penalties for failure to meet the laws' standards and deadlines? See 53 PA. CONS. STAT. ANN. § 4000.1501(a), (b) (Purdon 1989). See also Regional Note, *supra* note 14, at 114.

that includes the entire area of all the acting counties” or (b) “[d]esignate itself as a county solid waste management district.”⁴⁴ In the case of a county choosing to designate itself a single-county district, the legal mechanism for achieving this purpose is straightforward: the county must pass an ordinance specifying its intent.⁴⁵ However, counties choosing the alternative option of forming a joint solid waste management district must not only pass county-specific ordinances expressing their intent, counties must also pass ordinances that “include the approval of an *agreement* governing the operation of the joint district.”⁴⁶ Moreover, unlike the relatively simple formation of a single-county district, counties that have decided to become part of a joint district must submit their respective enabling ordinances — incorporating the joint district agreement — to the IDEM commissioner within thirty days of adoption.⁴⁷

Although a county’s decision either to designate itself a single-county district or to join with other counties in a joint district is of considerable strategic importance, the Act allows municipal governments to freely change their decisions. Specifically, the Act allows one district to merge with another district,⁴⁸ while authorizing a county to exercise the option of withdrawing from a joint solid waste management district if the county’s withdrawal ordinance is enacted before the IDEM commissioner approves the pending joint district plan.⁴⁹

44. IND. CODE § 13-9.5-2-1(a) (Supp. 1990). A county’s failure to comply with this requirement before July 2, 1991 leads to the county’s automatic designation as a single-county district by the IDEM. *Id.* § 13-9.5-2-1(c).

45. *Id.* § 13-9.5-2-1(a).

46. *Id.* § 13-9.5-2-1(b) (emphasis added).

47. *Id.* § 13-9.5-2-3. Although there exists no express power for the IDEM Commissioner to disapprove or modify a joint district agreement, this power is probably inherent given the authority of the Commissioner to disapprove district plans under Indiana Code § 13-9.5-4-3(c).

48. *Id.* § 13-9.5-4-12. Merging districts must, however, strictly comply with the specific statutory requirements that provide in pertinent part:

(a) A district may merge with one . . . or more other districts after the adoption of identical resolutions by the board of each district to be merged.

(b) Upon adoption of identical resolutions under subsection (a), a board for the resulting merged district shall be established using the procedures set forth in IC 13-9.5-2.

(c) A merged district must adopt its district plan within thirty . . . days after the merger is completed and file the district plan with the commissioner.

(d) A district plan adopted under this section is considered approved unless the commissioner notifies the district within thirty . . . days after the district plan is filed with the commissioner that the district plan fails to comply with the state plan.

Id.

49. *Id.* § 13-9.5-4-13. Even if a county timely withdraws from a joint district before

b. Composition of district boards

After one or more counties form a solid waste management district, the Act requires that a board of directors be appointed.⁵⁰ The board of directors is determined by an elaborate representational scheme that is apportioned among the executive and legislative branches of the counties and municipalities within the district.⁵¹ The form of the respective district boards follows their respective geographic configurations. The statute provides for two basic structures: a single-county district board and a joint district board. However, certain variations on these basic structures are also permitted.

The basic organizational structure for a single-county district requires that a board consist of the following: two members from the county executive; one member from the county fiscal body; one member from the executive body of the largest city or town in the district; one member from the legislative body of the largest city or town in the district; one member from the executive body of a smaller city or town in the district;

the IDEM Commissioner has approved a pending joint district plan, the county's withdrawal will be ineffective under the Act if it does not follow the detailed follow-up regulations of § 13, which provides in pertinent part:

(a) Before the district plan of a joint district is approved [by the IDEM Commissioner], a county may by ordinance of its executive remove itself from the joint district and:

(1) Designate itself as a county district;

(2) Join into a joint district; or

(3) Join with one . . . or more other counties in establishing a new joint district.

(b) If a county designates itself as a county district . . . the board appointed for the new county district under IC 13-9.5-2-4 must file a district plan with the commissioner within ten (10) days after the passage of the ordinance. If the district plan is not filed, the removal of the county from the joint district is not effective.

(c) If a county desires to join into a joint district . . . , the board of the other district must approve the addition of the county to the district, amend its district plan to include the additional county, and file the amended district plan with the commissioner within thirty (30) days after the addition of the county to the district. If the district plan is not filed, the removal of the county under subsection (a) is not effective.

(d) If a county desires to join in establishing a new joint district under subsection (a)(3), the board of the new joint district must, within thirty . . . days after the adoption of an ordinance establishing the joint district and approving an agreement governing the operation of the joint district, file a new district plan with the commissioner. If the district plan is not filed, the removal of the county under subsection (a) is not effective.

Id.

50. *Id.* § 13-9.5-2-4.

51. *Id.* § 13-9.5-2.

and one additional member of the county executive.⁵² The basic organizational structure for a joint district with only two counties requires that a board consist of the following: one member from the county executive of each participating county; one member from the county fiscal body of each participating county; one member from the executive body of the largest city/town in the joint district; one member from the legislative body of the largest city/town in the joint district; executives of each second-class city in the joint district; by agreement, additional members appointed by the county executive — from among their membership — based on the county's population; and, in the event of an even number on the joint district board, one additional member appointed by the county executive of the most populous county in the district, from among its membership.⁵³

One of the Act's more interesting and thoughtful organizational mandates for solid waste management districts⁵⁴ is the requirement that each district board "appoint and convene a solid waste management advisory committee of citizens, including representatives of the solid waste management industry operating in the district, who are knowledgeable about and interested in environmental issues."⁵⁵ These citizen advisory committees have two broad legislative purposes: to "(1) [s]tudy the subjects and problems specified by the [district] board and recommend to the board additional problems in need of study and discussion, [and] (2) [i]f invited by the board to do so, participate, without the right to vote, in the deliberations of the board."⁵⁶

52. *Id.* § 13-9.5-2-5(a). The Act provides for more complex arrangements in certain instances. For a single-county district with two second class cities, the executive of each city serves as a member of the district board. *Id.* § 13-9.5-2-5(b). In the case of a single-county district with three second class cities, the district board requires inclusion of one member from the county executive, two members from the county fiscal body, the executives of each second or third class city, and one member from "the fiscal body of each town appointed by the fiscal body." *Id.* § 13-9.5-2-5(d). Moreover, in the unique case of Indianapolis/Marion County (having what the Act refers to as "a county having a consolidated city"), if Marion County chooses to become a single-county district, its board would be the Board of Public Works. *Id.* § 13-9.5-2-5(c).

53. *Id.* § 13-9.5-2-6. The Act provides for a variation on joint district membership in the event of three or more counties comprising the district. In such a case, the counties may enter into an "interlocal cooperation agreement" under Indiana Code § 36-1-7 regarding the memberships and terms of office for the district board provided that all such board members be "elected officials." *Id.* § 13-9.5-2-6(d).

54. Other organizational strictures for both single-county districts and joint districts include term of office provisions, *id.* § 13-9.5-2-8(b), and required officers of the board, *id.* § 13-9.5-2-9(b) (neither applies to Indianapolis/Marion County).

55. *Id.* § 13-9.5-2-10.

56. *Id.* § 13-9.5-2-10(a).

c. District powers

Once a solid waste management district is formed and a board of directors is appointed, the Act provides for broad categories of governmental powers to be exercised. These governmental powers fall into three basic categories: (1) solid waste management powers, (2) fiscal powers, and (3) solid waste management and planning powers.

The most important solid waste management powers include the power to develop and implement a district solid waste management plan; the power to plan, design, finance, construct, manage and maintain solid waste management facilities; the power to acquire real and personal property for solid waste management or disposal; and the power to hire necessary personnel in accordance with an approved budget while contracting for professional services.⁵⁷ Key fiscal powers of solid waste management districts entail the power to impose district fees on the disposal of solid waste within the district; the power to disburse and receive funds; the power to borrow money from the district planning revolving loan fund; and the power to levy a district tax to pay for solid waste management operating costs, subject to regular budget and tax levy procedures.⁵⁸ Significant general powers also allow districts to sell or lease facilities; sue and be sued; borrow in anticipation of taxes; and to adopt resolutions that have the force of law.⁵⁹ A district board does not have the express power of eminent domain or the power to "exclusively control" solid waste collection and disposal activities within a district.⁶⁰

In an expansive and cumbersome section, the Act authorizes district boards to delegate various powers. First, the district may delegate authority to board officers.⁶¹ Second, the board may delegate its powers to "any board or legislative body of a municipality," but the district must ratify any exercise of taxing powers. Further, the delegation of powers to a municipal board must be followed by approval of the municipal legislative body involving tax and fiscal matters.⁶² Third, delegation of a district board's powers "must contain reasonable standards

57. *Id.* § 13-9.5-2-11(a)(1), -11(a)(6), -11(a)(9), -11(a)(16). Incidental solid waste management powers are the power to contract, the power to enter property for examination and testing, and "[t]he power to otherwise do all things necessary for the reduction, management, and disposal of solid waste and the recovery of waste products from the solid waste stream." *Id.* § 13-9.5-2-11(a)(7), -11(a)(12), -11(a)(17).

58. *Id.* § 13-9.5-2-11(a)(2), -11(a)(3), -11(a)(5), -11(a)(14). Incidental district fiscal powers pertain to authority to accept gifts, grants, and loans. *Id.* § 13-9.5-2-11(a)(13).

59. *Id.* § 13-9.5-2-11(a)(4), -11(a)(8), -11(a)(19), -11(a)(15), -11(a)(18).

60. *Id.* § 13-9.5-2-11(b).

61. *Id.* § 13-9.5-2-12(b).

62. *Id.* § 13-8.5-2-12(a).

and parameters within which the delegated powers may be exercised.”⁶³

3. *New and Expansive Local Governmental Financing Tools.* — In addition to instituting solid waste planning⁶⁴ and establishing new local governmental entities to plan and manage solid waste,⁶⁵ the Act also provides these new governmental entities with a variety of new tools to finance waste management activities. Section 13-9.5-9 of the Act creates a special taxing district within each solid waste management district to provide solid waste management services to persons within the district.⁶⁶ The special taxing district is conterminous with the particular territory of the solid waste district.⁶⁷

a. Solid waste management fees

In addition to the power to impose solid waste disposal fees to pay for the expense of developing and implementing a district solid waste plan,⁶⁸ the Act also authorizes district boards to establish solid waste management fees.⁶⁹ These fees apply to persons owning real property benefited by waste collection systems or waste disposal facilities.⁷⁰ District

63. *Id.* § 13-9.5-2-12(c). A number of interpretational questions remain open regarding this section. *Query*: Is the delegation of authority to “any board or legislative body of a municipality” limited by the geographic scope of a district? While such an interpretation would conform to the structure and purpose of the Act, it would be wise for the legislature to clarify this issue. *Query*: What are the implications of a delegation of authority without “reasonable standards and parameters”? Would the exercise of authority be *ultra vires* and, therefore, void, or merely voidable, depending on particular facts and circumstances? Who would be authorized to sue to challenge grants of a board’s delegated powers?

64. *See supra* notes 10-41 and accompanying text.

65. *See supra* notes 42-63 and accompanying text.

66. IND. CODE § 13-9.5-9-1(a) (Supp. 1990).

67. *Id.* § 13-9.5-9-1(b). Examples of other taxing districts include park, sanitation, flood control, thoroughfare, and redevelopment districts. Chapter 9 of the Act establishes a new type of special taxing district under Indiana law: a solid waste facilities special taxing district. *Id.* § 13-9.5-9-1(a). The structure and purpose of Chapter 9 authorizes the districts to have the power to issue bonds to finance solid waste facilities and to levy an unlimited *ad valorem* property tax to pay debt service. *Id.* § 13-9.5-9-3. As a result of the ability of solid waste management districts to levy the tax, the bonds should be freely marketable and sell at competitive interest rates.

68. *Id.* § 13-9.5-7. Revenue collected under this chapter is known as the “district solid waste management fund” for the particular solid waste district. *Id.* § 13-9.5-7-2.

69. *Id.* § 13-9.5-9-2(a).

70. *Id.* The district solid waste management board may fix the solid waste management fees on the basis of the following:

- (1) A flat charge for each residence or building in use in the waste management district.
- (2) On weight or volume of the refuse received.
- (3) On the average number of containers or bags of refuse received.

boards may exercise reasonable discretion in adopting differing solid waste management fee schemes based upon a variety of fiscal factors.⁷¹ Solid waste management fees may be used, together with other revenues, to pay for the following expenses: (1) solid waste management facilities' costs; (2) solid waste management facilities' operation and maintenance costs; and (3) principal and interest charges on district waste management or revenue bonds.⁷²

b. Waste management district bonds

Boards are allowed to issue waste management district bonds⁷³ for payment of costs of solid waste management facilities.⁷⁴ The solid waste

(4) On the relative difficulty associated with the collection or management of the solid waste received.

(5) On any other criteria that the board determines to be logically related to the service.

(6) On any combination of these criteria.

Id. § 13-9.5-9-2(b).

71. *Id.* § 13-9.5-9-2(d). These factors — which are subject to a discretionary balancing test — include: “(1) [t]he cost of furnishing . . . [solid waste] services . . . to various classes of owners of property; (2) [t]he distance of the property benefited from the facility; [and] (3) [a]ny other variations the board determines to be logically related to the cost of the service.” *Id.*

72. *Id.* § 13-9.5-9-2(g).

73. *Id.* § 13-9.5-9-3. The bond issuing process commences when plans and specifications are proposed according to the public bidding requirements of § 36-1-12 or a resolution approving a request for proposals under § 13-9.5-8 has been adopted. Thereafter, the board must adopt a resolution declaring that the “public health and welfare” and the “public utility and benefit” would be served by constructing, modifying, acquiring, or maintaining a solid waste facility. *Id.* § 13-9.5-9-3(b).

74. The term “facility” is quite broad:

“Facility” means any facility, plant, works, system, building, structure, improvement, machinery, equipment, fixture, or other real or personal property of any nature that is to be used, occupied, or employed for the collection, storage, separation, processing, recovery, treatment, marketing, transfer, or disposal of solid waste.

Id. § 13-9.5-1-13. Therefore, “facility” includes more than just disposal facilities, such as landfills and incinerators, but also includes recycling and composting facilities.

“Cost” is also broadly defined under the Act.

“Cost,” as applied to a facility or any part of a facility, includes the following:

(1) The cost of construction, modification, decommissioning, disposal, or acquisition of the facility or any part of the facility.

(2) Financing charges.

(3) Interest before and during construction and for a reasonable period after the construction as determined by the board.

(4) The cost of funding reserves to secure the payment of principal and interest on bonds issued by the district.

(5) The cost of funding an operation and maintenance reserve fund.

management district boards levy the special tax on real estate each year in the amount necessary to pay principal and interest on the waste management district bonds.⁷⁵ The waste management district bonds are "special obligations" and not "in any respect" obligations of the counties and municipalities that make up the district.⁷⁶ Rather, the bonds are to be payable out of a special tax levied upon all property of the district.⁷⁷

c. Revenue bonds

Solid waste management district boards may also issue revenue bonds to finance the costs of solid waste facilities.⁷⁸ A board must authorize revenue bonds by resolution, and specify as part of the resolution that the bonds are payable "solely from and secured by a lien upon the revenues of all or part of the facilities."⁷⁹ Like waste management district bonds, revenue bonds are special obligations of the district and not a debt of any local governmental entity.

d. Waste management development bonds

The Act allocates additional power to solid waste management district boards to finance solid waste facilities by providing financing similar to industrial development bond financing. Specifically, boards are authorized to make direct loans to users or developers for the cost of acquisition, construction, or installation of facilities, including real property, machinery, or equipment.⁸⁰ Development bonds need to be secured by the pledge of one or more bonds or other secured or unsecured debt obligations of the users or developers.⁸¹

(6) The cost of funding a major repair or replacement fund.

(7) Legal and underwriting expenses.

(8) Municipal bond insurance premiums.

(9) The cost of plans, specifications, surveys, and estimates of costs and revenues.

(10) Other expenses necessary or incidental to determining the feasibility or practicability of constructing the facility.

(11) Administrative expense.

(12) Other expenses necessary or incidental to the construction, modification, or acquisition of the facility, the financing of the construction, modification, or acquisition, and the placing of the facility in operation.

Id. § 13-9.5-1-6.

75. *Id.* § 13-9.5-9-3(h).

76. *Id.* § 13-9.5-9-3(f).

77. *Id.*

78. *Id.* § 13-9.5-9-4(a).

79. *Id.* § 13-9.5-9-4(c).

80. *Id.* § 13-9.5(a)(5).

81. *Id.*

e. District notes

The Act also empowers solid waste management districts to borrow money by issuing notes pending receipt of grants or in anticipation of the issuance of bonds.⁸² District notes may be sold at public or private sales.⁸³ The maximum maturity of the notes is five years, and they are payable from the proceeds of the anticipated grant or bond revenue.⁸⁴

4. *Recycling and Waste Reduction Incentives and Regulation.* — The legislature has delegated mandatory command and control authority to the state solid waste management board to adopt rules “establishing a date after which the disposal of recyclable materials in a final disposal facility will be prohibited or, if disposal is necessary, restricted to the greatest extent practicable.”⁸⁵ The Act also provides a panoply of economic incentives and study provisions to encourage recycling and waste reduction activities. First, Indiana Code section 13-9.5-5 imposes a state solid waste management fee beginning January 1, 1991, on the disposal of solid waste in a final disposal facility in Indiana (such as a landfill, waste-to-energy facility, or incinerator).⁸⁶ Revenue from the fund is paid into the state solid waste management fund. Money in the fund will be used to provide grants and loans to promote recycling within Indiana.⁸⁷

82. *Id.* The financing agreement between a developer or user and a district waste management board must provide for payments sufficient to pay the district's debt service on the bonds and may not exceed 40 years duration. *Id.* § 13-9.5-9-5(f).

83. *Id.* § 13-9.5-9-7(b).

84. *Id.* § 13-9.5-9-7(b), (c). For general bond provisions dealing with matters such as terms of issue, type of interest, redemption, reserves, maturity, taxability, security, and other matters, see *id.* § 13-9.5-9-8.

85. *Id.* § 13-7-28-3. The “solid waste management board” refers to the pre-existing state board established by Indiana Code § 13-1-12. “Final disposal facility” means “(1) an incinerator (as defined in IC 13-7-1-13.5); or (2) [a] solid waste landfill.” *Id.* § 13-7-28-1. For purposes of the chapter, “solid waste landfill” means a solid waste disposal facility at which solid waste is deposited on or beneath the surface of the ground as an intended place of final location.” *Id.* § 13-7-28-2.

86. *Id.* § 13-9.5-5-1. The fee for solid waste generated in Indiana is 50¢ per ton. The fee for solid waste generated outside Indiana is the greater of the following:

(A) The cost per ton of disposing of solid waste, including tipping fees and state and local government fees, in the final disposal facility that is closest to the area in which the solid waste was generated, minus the fee actually charged for the disposal or incineration of the solid waste by the owner or operator of the final disposal facility in Indiana.

(B) Fifty cents. . . .

Id. § 13-9.5-5-1(a)(2). Whether the out-of-state generation state disposal fee will pass constitutional scrutiny under the dormant commerce clause analysis is a problematic issue. See *supra* note 37.

87. IND. CODE § 13-9.5-5-1(b) (Supp. 1990). The owner or operator of a final disposal facility will be responsible for collecting the fees and will receive as compensation

In addition to the state solid waste management fee, the fund may also receive appropriations from the legislature and gifts and loans.⁸⁸

Second, the Act also adds a new recycling promotion and assistance fund.⁸⁹ The purpose of this provision is "to promote and assist recycling throughout Indiana by focusing economic development efforts on businesses and projects involving recycling."⁹⁰ Third, the Act creates mandates for state consideration of markets for new products made from recycled materials.⁹¹ Fourth, the legislation requires the state Department of Commerce to consider the state economic development assistance's potential environmental impact and to give priority to businesses and industries that "convert recyclable materials into useful products or [that] create markets for products made from recycled materials."⁹²

Fifth, the Act renames the state energy development board the "Indiana recycling and energy development board."⁹³ The Act mandates additional responsibilities of the board that include consideration of projects creating markets and new products from recycled materials.⁹⁴ Sixth, the Act requires the IDEM to establish two new task forces: a "packaging waste reduction task force"⁹⁵ and a "recycled paper task force."⁹⁶

In light of these overlapping recycling provisions in the Act, juxtaposed with the mandatory state and regional solid waste planning provisions discussed above,⁹⁷ the planning process will at first probably

an amount equal to 1% of the fees collected. *Id.* § 13-9.5-5-4. The fee does not apply to the disposal of solid waste by a person who generated the solid waste and disposed of it at a site owned by the person and limited to disposal of the person's solid waste. *Id.* § 13-9.5-5-5.

88. The Indiana Department of Environmental Management will administer the money in the fund. Grants and loans from this fund will probably concentrate on assisting local governments and not-for-profit organizations in establishing recycling programs. *Id.* § 13-9.5-5-2.

89. *Id.* § 4-23-5.5-14 (1988 & Supp. 1990).

90. *Id.* § 4-23-5.5-14. Sources of money for the fund consist of appropriations from the legislature, repayment of proceeds of loans made from the fund, gifts and donations, and money from the solid waste management fund. *Id.* § 4-23-5.5-15(b). During the 1990 legislative session, no state money was appropriated to either the state solid waste management fund or the recycling promotion and assistance fund. Thus, all funding for the initial year will have to come from the 50¢ per ton state solid waste disposal fee. Regulations addressing the distribution of monies between the two funds would help clarify and guide distribution policies.

91. *Id.* § 4-3-11-6.

92. *Id.* § 4-4-3-8.1.

93. *Id.* § 4-23-5.5-2(a).

94. *Id.* § 4-23-5.5-6.

95. *Id.* § 13-7-3-14 (Supp. 1990).

96. *Id.* § 13-7-3-15.

97. See *supra* notes 10-41 and accompanying text.

focus on ideas for recycling. "Recycling is popular. It allows community groups, municipalities, and businesses to work cooperatively toward a common goal. There are many attractive options to evaluate, and much to learn."⁹⁸ However, as the July 1, 1992 deadline for preparation of district solid waste plans approaches,

the planning focus will naturally shift away from recycling to solid waste treatment and disposal. Community leaders will have the political and legal responsibility to answer the tough questions on long-term solid waste management. They must consider specific energy recovery, incinerator and landfill operations in detail. This discussion is not popular or attractive, but it is as necessary as the discussion on recycling.⁹⁹

Specific recycling and waste reduction policies that likely will be considered in the course of solid waste planning in Indiana include curbside pickup, closed loop recycling, user-fees, composting, mandated reduced excess packaging, and household hazardous waste recycling programs.¹⁰⁰

5. *Solid Waste Transportation Regulations.* — Two important solid waste hauling certification requirements are incorporated into the Act. The first provision, section 13-7-22-2.7(c), requires a hauler who transports solid waste to a final disposal facility in Indiana to present to the owner/operator of the facility (1) a written statement in which the hauler certifies under oath the Indiana county or the state in which the largest part of the solid waste was generated, and (2) if the largest part of the solid waste was generated outside Indiana, a document in which an officer of the state or local government who has responsibility for protection of public health certifies that the solid waste generated in that state is not subject to regulation as a hazardous waste under federal law or as an infectious waste under Indiana law.¹⁰¹

98. INDIANA RECYCLING COALITION NEWSLETTER No. 1 (Aug. 1990).

99. *Id.*

100. *Id.* See also THE INSTITUTE FOR LOCAL SELF-RELIANCE, INDIANA'S ALTERNATIVES TO SOLID WASTE DISPOSAL (May 1990).

101. IND. CODE § 13-7-22-2.7(c) (Supp. 1990). The solid waste must not be "subject to regulation as hazardous waste under the federal Solid Waste Disposal Act (42 U.S.C. §§ 6901-6992k) or as infectious waste under Indiana Code section 16-1-9.7." *Id.* The hauler certificate is not required under § 13-7-22-2.7(g) if the county executive or local district board of the county where the disposal facility is located has entered into an agreement with a governmental unit in a county in another state, but contiguous to Indiana, and the hauler certifies that the largest part of the waste was generated in that governmental unit, or if the IDEM Commissioner exempts solid waste generated in a contiguous county, if the Commissioner determines that the disposal will not impair the long-term disposal capacity of Indiana or the health and safety of the people of Indiana. *Id.* § 13-7-22-2.7(h). Moreover, the hauler certificate requirements do not apply to disposal of waste

The Act's second solid waste hauler certification requirement is in section 13-9.5-11-1.¹⁰² This provision requires that after June 30, 1990, a hauler disposing of waste in Indiana certify under oath the origin of the largest part of the solid waste by volume. Moreover, under this section, after June 30, 1990, a hauler that collects waste in Indiana and takes waste to a transfer station or final disposal facility outside Indiana is required to maintain records that identify the county and state of origin of the largest part of the solid waste by volume, and is also required to file quarterly reports stating the location of the out-of-state transfer station or disposal facility and the volume of waste from each county and state taken to each facility.¹⁰³

6. *Miscellaneous Solid Waste Mandates.* — In addition to the solid waste planning, management, and recycling provisions, the General Assembly enacted and the Governor signed a miscellany of new solid waste laws during 1990. First, the legislature tightened administrative and financial disclosure requirements in four separate bills. Portions of Public Law No. 70-1990 require IDEM to designate ten of its employees as

by generators in a site owned by the generator and limited to the generator's use, *i.e.*, "captive sites." *Id.* § 13-7-22-2.7(b).

Query: Does the burden on interstate commerce created by the hauler certification requirement pass constitutional muster under the dormant Commerce Clause analysis? *See supra* note 37.

102. *Id.* § 13-9.5-11-1.

103. *Id.* § 13-9.5-11-2. If the hauler picks up waste from other than the point of origin (*i.e.*, a transfer station), the hauler may obtain certification from the owner of the transfer station of the waste's county and state of origin. Captive sites are exempt. *Id.* §§ 13-9.5-11-3, -4. *Query:* Does the burden on interstate commerce created by the hauler record provision comply with the dormant Commerce Clause? *See supra* note 37.

Two additional statutes passed by the Indiana General Assembly deal with other solid waste transportation issues. Indiana Code Chapter 31 addresses municipal waste transportation and requires municipal waste collection and transportation vehicles (including trucks or rail cars used to transport solid waste from a generator or processing facility to a processing facility in Indiana) to be licensed by IDEM. *Id.* § 13-7-31-9. This provision also grants IDEM power to inspect vehicles transporting municipal waste. *Id.* § 13-7-31-11. Moreover, municipal waste collection and transportation vehicles transporting waste from processing facilities must (1) bear a placard, stating that the vehicle is carrying municipal wastes, and (2) be accompanied by a manifest stating the weight of solid wastes transported, the processing facility from which the waste is transported, and the destination and name of the transporter. Under this statute, a solid waste or processing facility in Indiana may not accept a shipment of waste from a vehicle not licensed and not accompanied by a proper manifest. *Id.* § 13-7-31-12.

Indiana Code § 16-1-28-13.5 specifies that trucks used to transport more than 4,000 pounds of solid waste to a landfill, incinerator, or transfer station may not be used to transport food less than 15 days after transporting solid waste, unless properly sanitized. *Id.* § 16-1-28-15.5. Under this legislation, the State Board of Health may adopt rules to implement the law and to require documentation regarding transportation of food and to establish procedures for sanitizing trucks. *Id.* § 16-1-28-13.5(g).

landfill inspectors.¹⁰⁴ The Act also requires permit applicants for hazardous waste landfills, solid waste landfills or transfer stations to assure financial responsibility for closure and post-closure, and monitoring and maintenance costs.¹⁰⁵ Likewise, Public Law 107-1990 prohibits IDEM from issuing an "original permit" for the construction or operation of a solid waste disposal facility unless the permit applicant submits an audited financial statement indicating that the applicant's net worth is at least \$250,000 and swears or affirms that there are no outstanding liens, judgments, or other obligations arising from the applicant's violation of an environmental law.¹⁰⁶ Similarly, Public Law No. 19-1990 adds administrative requirements by specifying that the state solid waste management board address detailed conditions in authorizing the issuance of permits to control solid waste, hazardous waste, and atomic radiation at hazardous waste facilities, incinerators, solid waste landfills, and transfer stations in Indiana.¹⁰⁷ Public Law No. 109-1990 concludes the

104. *Id.* § 13-7-22-3.

105. *Id.* §§ 13-7-22-3, -32. Financial responsibility under the legislation may be established by any one or combination of the following legal means in an appropriate amount: (1) trust fund agreement, (2) surety bond with a standby trust fund agreement, (3) letter of credit with a standby trust fund agreement, (4) insurance policy with a standby trust fund agreement, or (5) proof that the applicant meets a financial test established by the state waste management board, in the event that the applicant "derives less than fifty percent . . . of the persons' gross revenue from waste management." *Id.* § 13-7-32-5(b). The discretionary financial test may offer applicants an opportunity to evade the more specific and rigorous financial assurances by creating multiple interconnected corporate entities and having one entity that does not derive more than 50% of its gross revenue from waste management apply for the permit. The specific financial assurance provisions arguably provide insufficient monetary protection against potential environmental problems that may develop at various facilities. *See id.* § 13-7-32-6(a) (in the case of a solid waste landfill or hazardous waste landfill the "greater of . . . \$15,000 for each acre or part of an acre" or "an amount determined by the [IDEM] Commissioner that is sufficient to [properly] close the hazardous waste landfill or solid waste landfill. . . ."); *id.* § 13-7-32-6(b) (in the case of a transfer station "the greater of . . . \$4,000 for each acre or part of an acre" or "an amount determined by the [IDEM] Commissioner that is sufficient to [properly] close the transfer station. . . ."). The legislature should consider amending these financial provisions by substantially raising the minimum dollar financial assurance to more accurately reflect closure and monitoring costs of similarly situated facilities.

106. *Id.* § 13-7-22-2. Although this provision is sound and will provide a modicum of financial protection to the public in the event that environmental problems arise at the site, it is fundamental that an applicant could strategically file bankruptcy under the federal bankruptcy laws notwithstanding technical insolvency. In the event of a bankruptcy filing, the government would have an unsecured claim for cleanup expenses with the possibility of claiming limited priority for remedial expenses deemed to be "administrative expenses" by the bankruptcy court. *See generally* ENVIRONMENTAL PROTECTION: LAW AND POLICY 682-84 (F. Anderson, D. Mandelker & A. Tarlock eds., 2d ed. 1990).

107. IND. CODE § 13-7-10-1 (Supp. 1990). This section added an amendment to existing legislation. The amendment expands the definition of "facility" to encompass "a

miscellaneous additional administrative requirements enacted during the 1990 General Assembly. It requires applicants for permits concerning solid waste, hazardous waste, and atomic radiation to submit a disclosure statement with the permit application demonstrating the applicant's "good character."¹⁰⁸ Moreover, this legislation compels applicants for solid waste management facility permits to demonstrate a need for the facility in the area in which the facility will be located.¹⁰⁹

Second, the legislature created another category of miscellaneous solid waste provisions that were passed into law during the 1990 General Assembly that strengthen the regulation of asbestos removal workers and asbestos contractors. Public Law No. 19-1990 generally requires that persons who work on asbestos removal projects be properly accredited or licensed.¹¹⁰

A third miscellaneous solid waste statute enacted during the review period requires a retailer, wholesaler, or manufacturer of lead acid batteries, upon selling new lead batteries, to accept used lead batteries from its customers.¹¹¹ This legislation also requires retail establishments in which lead batteries are sold to conspicuously post notices regarding battery recycling laws of Indiana.¹¹² The new law specifically restricts lead battery disposal practices and establishes a criminal offense for violation of the provisions.¹¹³

The fourth significant miscellaneous solid waste legislative enactment during the last General Assembly requires IDEM to develop an informational clearinghouse on various environmental topics and to assist in the development of public educational programs on alternatives to landfill disposal.¹¹⁴ Fifth, the legislature also requires that operators of outdoor waste tire sites must obtain a permit. This legislation also subjects the waste tire storage operator to state inspections.¹¹⁵

structure or area of land used for the disposal, treatment, storage, recovery, processing, or transferring of solid waste, hazardous waste, or atomic radiation" and specifically includes the generic types of facilities mentioned in the text by way of nonexclusive example. *Id.* Therefore, the practical effect of this amendment will be to require the state Solid Waste Management Board to promulgate rules prescribing standards for a wide panoply of solid waste facilities in the state.

108. *Id.* § 13-7-10.2-3.

109. *Id.* § 13-7-10-1.5. This localized need assessment may be subject to constitutional attack for violation of the dormant Commerce Clause doctrine. *See supra* note 37.

110. IND. CODE § 13-1-1-24 (Supp. 1990).

111. *Id.* § 13-1-15.

112. *Id.* § 13-1-15-6.

113. *Id.* § 13-1-15-7.

114. *Id.* § 13-7-3-14. The mandated environmental topics include the following: Source separation, recycling, composting, solid waste minimization, solid waste reduction, hazardous waste minimization, and hazardous waste reduction. *Id.*

115. *Id.* §§ 13-7-23-7, -10. As used in the statute, waste tire storage sites subject

The sixth miscellaneous solid waste bill enacted provides a price preference for state agency purchases of supplies that contain recycled materials.¹¹⁶ Specifically, state agencies must give a price preference of ten percent over competing non-conforming supplies when at least one of the following descriptions is fulfilled:

- (1) At least fifty percent . . . of the volume of the original components of the supplies consisted of recycled materials.
- (2) The cost of purchasing recycled materials constituted fifty percent . . . of the cost of producing the supplies.
- (3) A percentage by weight or volume of recycled materials which [IDEM] determines by rule is eligible for procurement preference¹¹⁷

Seventh, the 1990 General Assembly also enacted new legislation addressing changes to the responsible property transfer laws.¹¹⁸

B. Pollution Prevention

As a complement to the public information clearinghouse mandate established in separate legislation during the 1990 General Assembly,¹¹⁹ Public Law No. 105-1990 creates the division of pollution prevention and technical assistance within IDEM.¹²⁰ Perhaps the most significant component of this important new law is the expansive definition of "pollution prevention" that governs the activities addressed in the statute:

- (a) "Pollution prevention" means the employment by a business of a practice that reduces the industrial use of toxic materials or reduces the environmental . . . waste[s] without diluting or concentrating the waste before the release, handling, storage, transport, treatment, or disposal of the waste. The term includes changes in production technology, materials,

to regulation are sites "at which five hundred . . . or more waste tires . . . are accumulated in the outdoors at a single location . . . and . . . are not completely enclosed within a structure or vehicle." *Id.* § 13-7-23-5. In addition, the legislation provides for various exceptions for recycling programs and retail tire outlets under a certain size. *Id.* § 13-7-23-6.

116. *Id.* § 5-17-6-20.

117. *Id.*

118. *Id.* §§ 13-7-22.5-1.5 to -22.

119. *See supra* note 114 and accompanying text.

120. IND. CODE §§ 13-7-27-2(2), -9-2-1 (Supp. 1990). The division of pollution prevention and technical assistance does not take effect until June 30, 1993. Until that date, an office of pollution prevention and technical assistance is constituted within IDEM. *Id.*

processes, operations, or procedures, or the use of inprocess, inline, or closed loop recycling according to standard engineering practices.

- (b) The term does not include a practice that is applied to an environmental waste after the waste is generated or comes into existence or after the waste exists in production or commercial operation.
- (c) The term does not promote or require any of the following:
 - (1) Waste burning in industrial furnaces, boilers, smelters, or cement kilns for purposes of energy recovery.
 - (2) The transfer of an environmental waste (otherwise known as waste shifting) from one . . . environmental medium to any of the following:
 - (A) Another environmental medium.
 - (B) The workplace environment.
 - (C) A product.
 - (3) Off-site waste recycling.
 - (4) Any other method of end-of-pipe management of environmental wastes, including waste exchange and the incorporation or imbedding of regulated environmental wastes into products or byproducts.¹²¹

The scope of "pollution prevention" activities under IDEM jurisdiction favorably conforms to the rigorous approach recently recommended to Congress by the U.S. Office of Technology Assessment (OTA) which urged "a comprehensive, multimedia approach to reducing waste going into the air, land, and water"¹²² Indeed, Indiana's approach to pollution prevention — in OTA parlance — adopts "a new highly visible waste reduction program"¹²³ by requiring IDEM to undertake a variety of governmental activities including the following:

- Periodic "review [of] state environmental programs and projects for their ability and progress in promoting multimedia industrial pollution prevention."
- "Encouraging regulatory flexibility to afford businesses the opportunity to develop or implement pollution prevention technologies and practices."

121. *Id.* § 13-9-1-14.

122. U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, SERIOUS REDUCTION OF HAZARDOUS WASTE: FOR POLLUTION PREVENTION AND INDUSTRIAL EFFICIENCY 4 [hereinafter OTA REPORT]. See also Blomquist, *Beyond the EPA and OTA Reports: Toward a Comprehensive Theory and Approach to Hazardous Waste Reduction in America*, 18 ENVTL. L. 816 (1988).

123. OTA REPORT, *supra* note 122, at 40.

- Promoting coordination between governmental regulatory programs in all media of environmental pollution.
- "Develop[ing] policies and programs to reduce the generation of municipal wastes, reduce the generation of household hazardous wastes and pollutants, and reduce the use of toxic materials in consumer products by means of industrial pollution prevention."¹²⁴

A pathbreaking provision in the new statute allows the IDEM to "seek unified reporting and permitting authority from the United States Environmental Protection Agency with respect to federal toxic material, waste management, and pollution control laws and regulations"¹²⁵ Section 13, article 9 also establishes a pollution prevention board,¹²⁶ forms a safe materials institute at a public or private Indiana University or not-for-profit corporation,¹²⁷ authorizes the IDEM to make pollution prevention grants to non-profit organizations,¹²⁸ and establishes a computer-based state information clearing house for pollution prevention.¹²⁹

This legislation is reportedly "considered one of the best three pieces of pollution prevention legislation in the country by the National Toxic's Campaign,"¹³⁰ an environmental lobby group instrumental in passing similar laws throughout the country. A variety of additional legislative proposals regarding pollution prevention in Indiana are being formulated for the 1991 Indiana General Assembly.¹³¹ Accordingly, it appears that

124. IND. CODE § 13-9-1.3-5 (Supp. 1990).

125. *Id.* § 13-9-1.3-7.

126. *Id.* § 13-9-3-1.

127. *Id.* § 13-9-4-1. A novel directive to the Safe Materials Institute established under the legislation requires the Institute to encourage business to develop what are known as "multi-media pollution prevention plans." *Id.* § 13-9-5-1.

128. *Id.* § 13-9-2-10.

129. *Id.* § 13-9-2-9.

130. Undated Memorandum from Grant Smith, Indiana Toxic Action Campaign Coordinator at 1 [hereinafter Smith]. The Toxic Action Project is a state-wide project of the Citizens Action Coalition of Indiana.

131. The Indiana Toxic Action Project described some proposals in progress for the 1991 General Assembly:

(1) [T]he Industrial Efficiency and Pollution Prevention Planning Act of 1991. This legislation would require companies which file toxic release inventories under the community right to know law to complete and submit to the [I]DEM pollution prevention plans. Planning requirements now exist in twelve states and are considered to be a middle ground between completely voluntary programs and strictly regulatory programs. Planning requirements are designed to get business to go [through] the steps of planning how to implement pollution prevention programs at their facilities; and

Indiana Code section 13, article 9 may evolve into a more comprehensive statute in coming years.

C. *Underground Storage Tanks*

More than 1.4 million underground storage tank systems exist in the United States. These tanks store everything from petroleum products to hazardous materials. Of these, the U.S. Environmental Protection Agency estimates that approximately 189,000 tank systems are leaking.¹³²

Spurred on by recent federal legislation¹³³ and EPA rulemaking¹³⁴ regarding underground storage tanks, the Indiana General Assembly enacted Public Law No. 13-1990,¹³⁵ which made important changes in the state's underground storage tank program.

(2) The Truth in Toxics Act. Much more detailed information is required by state government and the public in determining the extent to which industry is actually pursuing pollution prevention. This legislation would ask for throughput information as to the use of toxic chemicals . . . on a mass balance level. Such reporting requirements exist now in New Jersey and Massachusetts. This higher level of detail concerning the amount, use, and emissions of chemicals has been in effect since 1986 in New Jersey and has not compromised the competitive position of industry in the state.

Smith, *supra* note 130.

132. M. HANNIFAN, UNDERGROUND STORAGE TANKS: A TECHNICAL PAPER 1 (1989).

133. In the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act, Congress mandated the development and implementation of a comprehensive regulatory program for underground storage tanks (USTs). This legislation also required UST owners to notify states of the existence of their tanks. The EPA was also required under HSWA to issue design, construction, installation, and compatibility standards for new USTs and to issue operating regulations applicable to all tank owners. See Pub. L. No. 89-272, Title II, §§ 9001-9010, as added Nov. 8, 1984; Pub. L. No. 98-616, Title VI, § 601(a), 98 Stat. 3277-3287 (1984) (codified at 42 U.S.C. §§ 6991-6991i).

Subsequent federal legislation, the Superfund Amendments and Reauthorization Act of 1986 (SARA), modified Pub. L. No. 89-272 by mandating that EPA issue regulations requiring owners and operators of UST systems to maintain evidence that they are financially responsible for corrective action and for compensating third parties for bodily injury and property damage arising from operating a UST. See *id.*, as amended Oct. 17, 1986, Pub. L. No. 99-499, Title II, § 205(a), 100 Stat. 1696 (1986) (codified at 42 U.S.C. §§ 6991-6991i).

134. On September 23, 1988, EPA published the final technical standards for USTs. 40 C.F.R. §§ 280.1-280.74 (1990). On October 26, 1988, the final financial responsibility regulations were published by EPA. See 40 C.F.R. §§ 280.90-280.111 (1990). Key requirements of this federal regulation include the following: construction standards for new USTs; upgrading of existing USTs over ten years to the performance level established for new tank systems; spill prevention equipment standards; overfill prevention equipment standards; reporting requirements; recordkeeping requirements; release detection requirements; spill containment and notification procedures; and minimal financial assurance provisions. *Id.*

135. Indiana House Enrolled Act No. 1393, Pub. L. No. 13-1990, § 6 (codified at IND. CODE § 13-7-20-12 (Supp. 1990)).

First, the new state legislation amends current law to require the IDEM and the state fire marshall to jointly operate "an underground storage tank release detection, prevention, and correction program."¹³⁶ However, consistent with notions of cooperative federalism whereby Congress and the U.S. Environmental Protection Agency set minimum national standards for environmental protection programs, the recently enacted Indiana legislation mandates that state standards and regulations for underground storage tank (UST) programs "must be no less stringent than" federal standards.¹³⁷

Second, the statute requires the state fire marshall to establish industry standards for persons involved in underground storage tank installation, testing, upgrading, and removal.¹³⁸ These standards also include procedures for certification revocation.

Third, the new statute makes numerous changes to the funding of the underground petroleum storage tank excess liability fund.¹³⁹ These changes focus on bonding authority,¹⁴⁰ increased fee charges per tank,¹⁴¹ loan guarantee procedures from the state rainy day fund,¹⁴² and establishment of a UST financial assurance board.¹⁴³

D. Natural Resources

The State of Indiana administers, preserves, and protects a wide range of natural resources. Given guidance by legislation and regulations on matters including fish and wildlife, forestry, historic preservation and archeology, nature preserves, outdoor recreation, surface mining reclamation, and other matters, the Indiana Department of Natural Resources (IDNR), supervised by the Natural Resources Commission, pursues numerous important responsibilities.¹⁴⁴ The General Assembly enacted a

136. IND. CODE § 13-7-20-12(a) (Supp. 1990). The joint administration is to be governed by rules adopted by the "fire prevention and building safety commission" with IDEM and the state fire marshall operating the program "under a memorandum of agreement . . . that must contain the specific duties of the department and the state fire marshall." *Id.*

137. *Id.* § 13-7-20-12(b). Specific reference is made to "regulations adopted by the administrator of the Environmental Protection Agency under 42 U.S.C. § 6991 through 6991i, as amended." *Id.*

138. *Id.* § 13-7-20-13.1.

139. *Id.* § 13-7-20-31.

140. *Id.* §§ 4-4-11-1 to -31.

141. *Id.* § 13-7-20-32.

142. *Id.* § 13-7-20-33.3.

143. *Id.* § 13-7-20-35.

144. The Indiana Chamber of Commerce describes the function of the Indiana Department of Natural Resources as follows:

The Indiana Department of Natural Resources oversees various forms of con-

variety of substantial, additional natural resource laws during the 1990 legislative session that will require IDNR to undertake further administrative responsibilities. First, Public Law No. 22-1990 allows the IDNR director to impose civil penalties up to \$1,000 per violation for certain infractions of the state flood plain law.¹⁴⁵ Second, the new statute restricts participation in IDNR's surface coal mining reclamation bond pool fund.¹⁴⁶ Third, the statute directs the IDNR to formulate timber management plans for each classified forest within Indiana,¹⁴⁷ and toughens certain procedures for granting and renewing surface coal mining and reclamation permits.¹⁴⁸

Fourth, the statute adds to the IDNR's responsibilities in regulating the impact of surface coal mines on certain historical and archeological sites.¹⁴⁹ Significantly, the new legislation provides for measures to mitigate the effects of mining operations on important archeological sites while liberalizing the types of information the agency must consider in assessing the archeological significance of proposed mining sites.¹⁵⁰

Fifth, the legislation authorizes the Natural Resources Commission to designate, by rulemaking, various Indiana streams to be "recreational streams."¹⁵¹ Moreover, the new statute permits the IDNR to conduct onsite investigations and to issue temporary restraining orders to stop water withdrawals by certain water pumping installations if an owner of a lake, by riparian right, complains of a significant drop in the level of the fresh water lake.¹⁵²

servation and manages the state's mineral and wildlife programs, flood control and water resources, recreational areas and historical landmarks. It has a director appointed by the governor; three deputy directors and a full-time staff of 1,510. The Department has jurisdiction over all public and private waters in the state as well as adjoining lands necessary for flood control purposes. All works of any flood control nature must be approved by the Natural Resources Commission. It has certain regulatory functions, including approval of construction and the floodways of rivers and streams; inspection and enforcement of maintenance and repair of dams, levees, dikes and floodwalls; approval of work to alter shoreline or beds of public freshwater lakes; review of plans for reconstruction or construction of drainage ditches, and removal of minerals and withdrawal of water from navigable waters.

INDIANA CHAMBER OF COMMERCE, *HERE IS YOUR INDIANA GOVERNMENT* 17 (1987).

145. IND. CODE § 13-2-22-21 (Supp. 1990).

146. *Id.* § 13-4.1-6.5-4.

147. *Id.* § 6-1.1-6-16 (1988 & Supp. 1990). This section changes prior law, which simply required that owners or operators of classified forest follow "minimum standards of good timber management prescribed by the Department of Natural Resources." *See id.*

148. *Id.* § 13-4.1-4-5.1 (Supp. 1990).

149. *Id.* §§ 13-4.1-3-3.1, -4-3.1.

150. *Id.*

151. *Id.* §§ 13-2-33-4, -5.

152. *Id.* §§ 13-2-2.6-9 to -12.

E. Water Pollution

Two significant legislative changes in Indiana water pollution control law occurred as a result of legislation enacted during the 1990 General Assembly. The first change apparently provides for more protection of the state's diverse water bodies. Public Law No. 19-90 addresses freshwater pollution concerns due to the 1988 oil spill caused by a storage tank's failure on the Monongahela River.¹⁵³ The statute requires the state water pollution control board to adopt rules directing the construction of secondary containment structures at facilities in which hazardous materials are stored or handled.¹⁵⁴ Importantly, "secondary containment structure" is defined as "a structure or part of a structure that prevents or impedes a hazardous material that is released accidentally from entering surface water or groundwater."¹⁵⁵ Moreover, the legislature has specifically delegated power to the board to require the "development by the owner or operator of each facility at which hazardous materials are stored or handled of a plan for responding to the release of a hazardous material at that facility."¹⁵⁶ The exemption provisions of this statute, however, arguably go too far in requiring the board to adopt generic exemptions from secondary containment structures in planning requirements for expansive categories of facilities that should be regulated by the state.¹⁵⁷

153. *Id.* § 13-1-3-19.

Supplies of drinking water to some 23,000 residents of suburban Pittsburgh, Pennsylvania, were cut off after a storage tank at Floreffe, Pennsylvania, spilled about 3.3 million liters (860,000 gallons) of diesel oil into the Monongahela River on January 2 [1988]. The oil slick spread into West Virginia, and by January 10 it was 77 km (48 mi) long and had reached Steubenville, Ohio. The oil was eventually cleaned up by a combination of inflatable booms with deep skirts, activated carbon, and bentonite.

BRITANNICA WORLD DATA ANNUAL 197 (1989).

154. IND. CODE § 13-1-3-19(d)(1) (Supp. 1990).

155. *Id.* § 13-1-3-19(d).

156. *Id.*

157. *Id.* § 13-1-3-19(e). The pertinent exemption language provides:

The rules adopted under this section must provide exemptions for the following:

- (1) A facility that is subject to similar requirements under other administrative rules or under state law, federal law, or federal regulation.
- (2) Hazardous materials that are stored or transferred as products packaged for distribution to and use by the public.
- (3) An aboveground storage tank that is used to store oils or petroleum products and that has a capacity of not more than six hundred sixty (660) gallons.
- (4) Tanks subject to regulation adopted by the administrator of the United States Environmental Protection Agency under 42 U.S.C. § 6991 through 6991(i), as amended.
- (5) Tanks subject to IC 13-7-20.

Id.

The second change in state water pollution control law during the survey period creates the prospect of less protection of Indiana waters. Public Law No. 106-1990 allows the water pollution control board to grant a variance from a water quality standard for a maximum period of five years, or when the permit expires, whichever is longer.¹⁵⁸ Prior to this statute, the maximum permissible period for all variance applications before the water pollution control board was one year.¹⁵⁹

In light of the primacy of water quality standards in maintaining ambient water standards for designated uses,¹⁶⁰ it is surprising that this statute allows such significant extensions of variance timeframes, even if the prior one-year variance time limitation arguably created administrative problems in reviewing or modifying NPDES permits.¹⁶¹ Indeed, as Professor William H. Rodgers, Jr. observed, although one might expect to find "moderating influences" in "a world of universal constraint and ubiquitous violation [of] water quality standards,"¹⁶² there needs to be "legal limits to this pattern, especially for violators who choose to defend [their non-compliance] on the ground that the standard should conform to their practice."¹⁶³

158. *Id.* § 13-7-7-6 (1988 & Supp. 1990).

159. *Id.* § 13-7-7-6(a) (1988), amended by *id.* § 13-7-7-6 (Supp. 1990).

160. The terms water quality criteria and water quality standards often are used synonymously. . . . Water quality criteria can be defined as ambient water standards, or legal expressions of permissible amounts of pollutants allowed in a defined water segment. This formulation typically appears in one or both of two forms: quantitative and descriptive. Examples of quantitative criteria are: not less than 5 parts per million of dissolved oxygen or more than 500 micrograms per liter of dissolved solids or more than 200 fecal coliforms per 100 milliliters of water. Examples of descriptive criteria are: Surface waters must be "free from floating debris, scum and other floating materials attributable to municipal, industrial or other discharges of agricultural practices in amounts sufficient to be unsightly or deleterious."

RODGERS, *supra* note 1, at 243 (footnote omitted).

161. National Pollution Discharge Elimination System (NPDES) permits "are for fixed terms not exceeding five years." 33 U.S.C. § 1342(b)(1)(B). See 40 C.F.R. § 122.46 (1990).

162. RODGERS, *supra* note 1, at 255.

163. *Id.* at 256 (footnotes omitted). Professor Rodgers continues his analysis on this point and analyzes the New York case of *Koch v. Dyson*, 85 A.D.2d 346, 448 N.Y.S.2d 698 (1982) to advance his argument. In *Koch*,

a power plant anticipated discharges into water already exceeding the thermal pollution standards. Granting of a variance was upheld without noticeable agonizing. Had the issue arisen under the Clean Air Act, by contrast, the legal problem would be called nonattainment, the nongrowth prospects would be conceded, and the new source would be obliged to buy, borrow, or beg to partake of this fully allocated resource.

RODGERS, *supra* note 1, at 256 (footnotes omitted).

F. Pesticides

Public Law No. 113-1990 largely consists of a series of technical amendments to preexisting pesticide regulatory standards in Indiana.¹⁶⁴ A few amendments will result in significant legal changes in this important policy area.

Indiana Code section 15-3-3.5-18.1 expands current pesticide law to make it unlawful to distribute an unregistered, adulterated, or misbranded product.¹⁶⁵ Moreover, the state chemist — as the key regulatory official involved in administering and enforcing the pesticide laws — is afforded new enforcement powers under another section. The state chemist may deny, suspend, revoke, or amend a person's pesticide registration for violating pesticide regulation, or "may warn, cite, or impose a civil penalty"¹⁶⁶ within the statutory confines. Related changes afford the state chemist additional enforcement flexibility in sanctioning holders of licenses, permits, or certifications for pesticide use in Indiana¹⁶⁷ in the event of violations of appropriate law.

III. STATE AND FEDERAL ENVIRONMENTAL CASE LAW, 1989-90

Federal and state decisions involving Indiana environmental disputes broke new ground during the survey period.¹⁶⁸ These decisions may be usefully grouped into three subject areas: (1) hazardous and toxic substances, (2) administrative law, and (3) natural resources.

A. Hazardous and Toxic Substances

Several federal and state decisions rendered during the survey period significantly contributed to the expanding and complex area of hazardous and toxic substance law.

164. IND. CODE §§ 15-3-3.5-2 to -26 (1988 & Supp. 1990).

165. *Id.* § 15-3-3.5-18.1 (Supp. 1990).

166. *Id.* § 15-3-3.5-18.3.

167. *Id.* §§ 15-3-3.6-14, -14.5 (1988 & Supp. 1990).

168. The United States Court of Appeals for the Seventh Circuit reviewed several environmental matters within its territorial jurisdiction during the survey period. However, none of these decisions focused on Indiana environmental disputes. *See Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990); *American Paper Inst., Inc. v. U.S. Env't'l. Protection Agency*, 882 F.2d 287 (7th Cir. 1989), *revised by* 890 F.2d 869 (7th Cir. 1989); *Rosenberg v. Tazewell County*, 882 F.2d 1165 (7th Cir. 1989); *National-Standard Co. v. Adamkus*, 881 F.2d 352 (7th Cir. 1989). Moreover, environmental case law from other federal circuits and other state courts constitute persuasive authority for environmental disputes in Indiana. *See generally* AMERICAN BAR ASSOCIATION SECTION NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW, 1989 THE YEAR IN REVIEW (1990).

1. *Citizens May Intervene and Substantially Expand RCRA Civil Penalty Enforcement Action.* — *United States v. Environmental Waste Control, Inc.*¹⁶⁹ was a landmark citizen enforcement action under the Resource Conservation and Recovery Act of 1976 (RCRA)¹⁷⁰ that resulted in the highest penalty ever assessed in such actions.¹⁷¹ United States District Judge Robert Miller permanently shut down a previously licensed hazardous waste landfill located in Fulton County, Indiana, otherwise known as the "Four County Landfill."¹⁷² Concluding that the site had

169. 710 F. Supp. 1172 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990), *petition for cert. filed*, (U.S. Jan. 29, 1991) (No. 90-1229). See also 698 F. Supp. 1422 (N.D. Ind. 1988) (denial of defendants' summary judgment motion); 737 F. Supp. 1485 (N.D. Ind. 1990) (ruling on citizen group's attorneys' fees and costs) for other aspects of the case.

170. 42 U.S.C. §§ 6901-6992 (1989).

171. See generally Note, *Putting Recovery Back Into RCRA: An Effective Addition to the Resource Conservation and Recovery Act*, 25 VAL. U.L. REV. 59 (1990). I have assisted the citizen group intervenor, Supporters to Oppose Pollution, Inc. (STOP), during portions of the litigation by assisting lead counsel John C. Hamilton of South Bend, Indiana. The views expressed in this analysis are my own and should not be ascribed to either STOP or Mr. Hamilton.

In UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1989 7-8 (1990) (emphasis in original), the EPA describes the litigation as follows:

On March 29, 1989, EPA and STOP, Inc., a citizens' group, obtained a judgment against Environmental Waste Control (EWC), Inc., for improper hazardous waste management practices under the Resource Conservation and Recovery Act (RCRA). EPA had alleged the following counts against defendants regarding the operation of the "Four-County Landfill" in Fulton, IN: (1) operating the landfill without legal authorization as a result of a false certification for compliance with groundwater monitoring and insurance requirements; (2) inadequacy in the existing system for monitoring possible groundwater contamination; (3) violation of the minimum technology requirement designed to limit migration of contaminants from the disposal area; and (4) the need for corrective action at the site to remedy ongoing releases of hazardous waste constituents into the groundwater site. *This is one of the most favorable decisions out of a number of cases EPA has successfully prosecuted in an initiative against owners and operators who have failed to certify proper groundwater monitoring systems and proper financial capability for hazardous waste management activity.*

The ruling upheld EPA's assertion that the landfill lost its authority to legally operate on November 8, 1985, after it falsely certified to EPA that the landfill had met both groundwater monitoring and liability requirements. It also required defendants to cease immediately receiving hazardous wastes for storage and disposal at the site, and to implement closure upon approval of a closure plan. In addition, it ordered the defendants to implement the corrective action plan proposed by EPA. *The judgment included the imposition of a civil penalty of \$2,778,000, which is the largest civil penalty assessed by a court under the Resource Conservation and Recovery Act.*

172. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1178.

lost its interim status because the owners and operators had filed a false certificate of compliance with regulatory authorities, Judge Miller also found that the landfill's groundwater monitoring system was inadequate and that hazardous waste constituents had been illegally released into the groundwater.¹⁷³ In assessing a civil penalty of \$2,778,000,¹⁷⁴ the court summarized and simplified the overwhelming evidence of environmental law violations at Four County Landfill:

Through the last day of trial, the Landfill had operated illegally by continuing to accept and store hazardous waste with neither interim status nor a final permit for 1,173 days, and each such day constitutes a separate violation; on the EPA's first claim, [the Landfill] faces civil penalties of as much as \$29,325,000. The Landfill placed hazardous waste in unlined trenches as part of its lateral expansion for 468 days . . . ; with each such day viewed as a separate violation, [the Landfill] faces civil penalties of as much as \$11,700,000 on the EPA's second claim. [The Landfill also] faces civil penalties for 773 days of violations, or as much as \$19,325,000 on the EPA's third claim.

In all, then, [the Landfill] faces civil penalties totalling \$60,350,000, even setting aside the additional penalties STOP [the citizen group] seeks The imposition of \$60,000,000 or more in civil penalties would be wholly punitive and would far exceed the scope of any proper deterrent purpose. On the other hand, this landfill should have ceased operation . . . when it had no lined cells in which to place hazardous waste in accordance with the law. It did not cease operation then. . . . The Landfill should have ceased operation . . . when its interim status was lost. Again, it did not do so; it continued to operate, ultimately earning income in excess of \$10,000,000 per year. [The Landfill] has been faced more than once with a choice between disobeying the law or continuing its operations; each time [the Landfill] chose to disobey the law and make more money. Substantial penalties, albeit penalties well below \$60,000,000 are warranted.¹⁷⁵

173. *Id.* at 1225-28.

174. Within a few days of the order in *Environmental Waste Control, Inc.*, 710 F. Supp. at 1248-55, the defendants filed for bankruptcy protection. *See In re Environmental Waste Control, Inc.*, 31 Env't. Rep. Cas. (BNA) 1462 (N.D. Ind. 1990) (denial of EPA's motion to withdraw reference of disclosure statements and plan of reorganization); *In re Stephen Shambaugh*, 30 Env't. Rep. Cas. (BNA) 2038 (Bankr. N.D. Ind. 1989) (denial of motion to withdraw reference of cases to the bankruptcy court). That matter is still pending. Recovery of the civil penalty and citizen suit attorney fees will largely depend on the outcome of the bankruptcy litigation.

175. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1244-45.

Judge Miller's eighty-three-page printed opinion is a veritable primer on RCRA. The scholarly opinion is a substantive contribution to the law of RCRA enforcement actions in numerous respects. First, the court held that the EPA had authority under the statute to "proceed on the issues of groundwater monitoring and financial assurance requirements."¹⁷⁶ This holding was based on a reading of section 6928(a) which, according to the court, "authorizes the EPA to bring an independent enforcement action, even in a RCRA authorized state"¹⁷⁷ like Indiana. According to Judge Miller's analysis, "[t]he sole restriction on this enforcement authority is that the EPA must notify the state before commencing any action."¹⁷⁸ However, "[s]ection 6928 'explicitly reserves federal authority in the face of an authorized state program.'"¹⁷⁹

A second significant aspect of the opinion is the expansive and flexible manner in which the court dealt with the problem of citizen suit notice under RCRA. The court found that the exception to the usual sixty-day notice in RCRA actions was applicable because the citizen group had made allegations concerning hazardous waste mismanagement.¹⁸⁰ In light of these allegations, the citizen suit could "be brought immediately after some notification" to the EPA, the IDEM, and the Four County Landfill's owners and operators.¹⁸¹ The court reasoned that this result was justified because the rationale of using a notice period as a "non-adversarial period in which environmental conflicts might be resolved administratively" did not apply in the case of environmental disputes concerning hazardous waste management.¹⁸² The district court concluded — in a flexible interpretation of litigation reality juxtaposed with the requirements of the statute — that "those entitled to notice under [RCRA] . . . had ample notice" of the citizen suit claims by virtue of STOP's motion to intervene.¹⁸³ This motion, in turn, attached a proposed complaint which fully set forth all allegations, and the motion papers were served on the EPA, the IDEM, and the owners/operators of the Four County Landfill. Moreover, the court interpreted 42 U.S.C.

176. *Id.* at 1186. The court also upheld the EPA's authority under 42 U.S.C. § 6928(h) to seek corrective action whenever it determines that "there is or has been a release of hazardous waste into the environment." *Id.* at 1187.

177. *Id.* (citing *United States v. Allegan Metal Finishing Co.*, 696 F. Supp. 275, 282 (W.D. Mich. 1988); *United States v. Conservation Chemical Co. of Ill.*, 660 F. Supp. 1236, 1244 (N.D. Ind. 1987)).

178. *Id.* (citing 42 U.S.C. § 6928(a)(2) (1988)).

179. *Id.* (quoting *Wyckoff Co. v. Environmental Protection Agency*, 796 F.2d 1197, 1201 (9th Cir. 1986)).

180. *Id.* at 1187-93.

181. *Id.* at 1189 (citing 42 U.S.C. § 6972(b)(1)(A)).

182. This motion attached a proposed complaint. *Id.* at 1190.

183. *Id.* at 1191.

§ 9613(i) — the section utilized by the citizen group to intervene in the RCRA enforcement action — to have resulted in an “absolute” right to intervene because the court had earlier “placed no conditions upon STOP’s intervention.”¹⁸⁴ Accordingly, the court found that no independent ground of federal jurisdiction need be shown¹⁸⁵ and that such intervention came within a federal court’s ancillary jurisdiction.¹⁸⁶

Third, the *Environmental Waste Control* court shed considerable light on the defense of primary jurisdiction in citizen environmental enforcement actions. Approving of dicta in another federal district court opinion, the court noted that “if the primary jurisdiction doctrines apply at all to citizens’ claims, it should be invoked ‘sparingly where it would serve to preempt a citizens’ suit.’”¹⁸⁷ Furthermore, Judge Miller pointed out that “[t]estimony and exhibits introduced by STOP rang with frustration at the ongoing alleged violations occurring at the Landfill and [the citizens’] repeated attempts to get Indiana to act.”¹⁸⁸ The court acknowledged that ready resort to the primary jurisdiction doctrine might lead to situations in which “delay by the state or federal government could frustrate the congressional interest of broadened enforcement” of citizen suits.¹⁸⁹ Thus, the court concluded that “[t]o deprive STOP the opportunity to bring its claims . . . would thwart the legislative intent behind the RCRA and CERCLA provisions for citizen intervention”¹⁹⁰

184. *Id.*

185. *Id.* at 1192 (citation omitted).

186. *Id.* “The exercise of ancillary jurisdiction promotes judicial economy and fairness. The EPA filed this enforcement action alleging that the defendants violated provisions of RCRA. STOP’s additional claims, while different in nature, allege violations of RCRA. . . . All alleged RCRA violations are contained in the same lawsuit.” *Id.*

187. *Id.* at 1195 (quoting *Merry v. Westinghouse Elec. Corp.*, 697 F. Supp. 180, 182 (M.D. Pa. 1988)). Earlier in its opinion, the court catalogued four major distinguishable principles encompassed by what is euphemistically referred to as the “primary jurisdiction doctrine”: “Primary exclusive jurisdiction, true primary jurisdiction, statutory exceptions, and agency [immunity].” *Id.* at 1193 (citing *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 39 (1952) (Frankfurter, J., dissenting) and Botein, *Primary Jurisdiction: The Need for Better Court/Agency Interaction*, 29 RUTGERS L. REV. 867, 868 (1976)). According to the *Environmental Waste Control* court:

“Primary exclusive jurisdiction” deprives the court of all power over a case except the very limited power . . . to review an agency’s determination. “True primary jurisdiction” affords an agency the initial opportunity to consider a legal issue or find facts, but the court retains the power to render a judgment.

Id. “EWC’s assertions involving EPA’s and STOP’s claims could only fall, if at all, within the boundaries of these two doctrines.” *Id.*

188. *Id.* at 1195.

189. *Id.* (summarizing *Merry v. Westinghouse Elec. Corp.*, 697 F. Supp. 180 (M.D. Pa. 1988)).

190. *Id.*

Fourth, the district court in *Environmental Waste Control* amplified vital principles regarding the use of collateral estoppel in complex environmental litigation in which prior administrative orders or consent decrees may have preceded enforcement litigation. In addressing this question, the court held that rules of collateral estoppel, rather than *res judicata*, should govern the effect of an earlier state administrative action involving the Four County Landfill.¹⁹¹ The court then determined that the earlier Indiana administrative proceeding did not have collateral estoppel effect with respect to the EPA's and the intervening citizen group's claims under RCRA. The court based its holding on the failure of the Four County Landfill's owners and operators to establish essential issue preclusion parameters: that the enforcement suit at bar presented the same issue that was resolved in the Indiana administrative proceeding; that the administrative consent order in the Indiana proceeding was a final decision on the merits; and that an identity of parties existed as governing Indiana law requires.¹⁹²

A fifth noteworthy dimension of the case is its analysis of the persons liable for hazardous waste storage sites under RCRA.¹⁹³ In a matter of first impression, the court held that a "facility can have more than one operator for RCRA purposes."¹⁹⁴ Adopting the reasoning from its earlier opinion in the case disposing of the defendants' summary judgment motion, the court reasoned:

[I]t is difficult to believe that if three persons operated a hazardous waste facility as a joint venture on property owned by four other persons, only two of the persons (one as an owner, another as an operator) could be liable for civil penalties under . . . RCRA. Not every act will render a person an operator, but the court is unpersuaded that no more than one person may be an operator with respect to a given hazardous waste facility.¹⁹⁵

Sixth, the court also made new law in interpreting the meaning of the EPA's minimal insurance coverage regulation for hazardous waste sites. These regulations read as follows:

191. *Id.* at 1196-97.

192. *Id.* at 1197-1201.

193. The pertinent provisions of RCRA applying to "owners" and "operators" of hazardous waste storage sites define "operator" as "the person responsible for the overall operation of the facility," while "owner" is defined as "the person who owns a facility or part of a facility." 40 C.F.R. § 260.10 (1989). The term "person" is defined at 42 U.S.C. § 6903(15) (1988).

194. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1202.

195. *Id.* (quoting *United States v. Environmental Waste Control, Inc.*, 698 F. Supp. 1422, 1429-30 (N.D. Ind. 1988)).

- (a) The owner or operator must have and maintain liability coverage for *sudden*, accidental occurrences in the amount of at least \$1 million per occurrence with an annual aggregate of at least \$2 million, exclusive of legal defense costs.
- (b) The owner or operator must have and maintain liability coverage for *non-sudden*, accidental occurrences in the amount of at least \$3 million per occurrence with an annual aggregate of at least \$6 million, exclusive of legal defense costs.¹⁹⁶

The court ruled on a number of novel insurance issues. Initially, the district court held that certification of compliance with RCRA regulations mandated both certification and actual compliance.¹⁹⁷ In addition, the *Environmental Waste Control* court ruled that the explicit limits of an environmental liability insurance policy governed; a general policy endorsement regarding the insurer's commitment to issue a certificate of liability insurance attesting to the site's compliance with federal environmental financial responsibility obligations did not operate to provide additional coverage for purposes of judging whether the owners and operators complied with federal financial responsibility obligations.¹⁹⁸ Moreover, Judge Miller found the EPA regulations to be clear and unambiguous¹⁹⁹ and that the EPA was not estopped from enforcing regulatory minimum liability regulations as a result of alleged misinformation verbally supplied over EPA's "hotline" telephone inquiry service.²⁰⁰ The court also held that good faith efforts to obtain appropriate RCRA liability insurance coverage, although pertinent to civil penalty assessment, were not relevant in determining compliance with RCRA financial responsibility requirements.²⁰¹

Seventh, the court amplified the meaning of EPA's groundwater monitoring certification regulation.²⁰² That regulation "require[s] that a hazardous waste landfill's groundwater monitoring system consist of at least four wells: one well . . . required to be installed hydraulically upgradient from the limit of the waste management area, while the remaining wells (at least three) [are] to be installed hydraulically down-

196. 40 C.F.R. § 265.147(a), (b) (1985) (emphasis added).

197. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1205. These certification requirements are mandated by 42 U.S.C. § 6925(e)(2) (1988), which compels compliance certification with financial responsibility and groundwater monitoring requirements.

198. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1206-07.

199. *Id.* at 1209-11.

200. *Id.* at 1211-12.

201. *Id.* at 1212-13.

202. 40 C.F.R. § 265.91(a) (1985).

gradient at the limit of the waste management area."²⁰³ The purpose of this regulatory requirement was succinctly described as follows:

The groundwater monitoring system is intended to provide immediate detection of any release of hazardous waste or hazardous waste constituents into the groundwater. Prompt detection reduces the cost and effort involved in arresting the spread of contaminants and restoring the quality of the groundwater.²⁰⁴

Eighth, the court reaffirmed its earlier partial summary judgment against the defendants²⁰⁵ while concomitantly clarifying the "minimum technology" provision of RCRA.²⁰⁶ Ninth, the court determined that the Four County Landfill's groundwater monitoring system failed to protect the environment and human health as required by statute²⁰⁷ and EPA regulation.²⁰⁸ In its rationale on groundwater assessment, the court demonstrated a sophisticated grasp of difficult scientific principles²⁰⁹ and an admirable facility to focus on relevant scientific information while insisting that the defendants bear the burden of demonstrating adequate groundwater monitoring.

A tenth remarkable aspect of the *Environmental Waste Control* decision is the court's review of enforcement claims of release of hazardous wastes into the environment. The district court followed Seventh Circuit precedent and gave the EPA regional administrator's determination of a hazardous waste release at the landfill a presumption of regularity.²¹⁰ The court also emphasized the importance of the required

203. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1213 (citing 40 C.F.R. § 265.91(a)).

204. *Id.*

205. *Id.* at 1221.

206. *Id.* at 1220-21. The court reasoned that:

42 U.S.C. § 6924 requires owners and operators of hazardous waste facilities to meet certain minimum technology standards. Section 6924(o)(1)(A) required owners and operators of existing landfills to use two more liners and with a leachate collection system above and below the liners when conducting a "lateral expansion" with respect to waste received after May 8, 1985. Owners and operators were required to notify the EPA of such lateral expansion at least sixty days before receiving any waste for placement in that expansion. 42 U.S.C. § 6936(b)(2). EWC violated both these sections by failing to notify the EPA of its intended lateral expansion and by placing hazardous waste in unlined cells and trenches.

Id.

207. *Id.* at 1222 (citing 42 U.S.C. § 6925(e) (1988)).

208. *Id.* at 1225 (citing 40 C.F.R. § 265.90(a)).

209. See generally R. PATRICK, E. FORD & J. QUARLES, *GROUNDWATER CONTAMINATION IN THE UNITED STATES* (2d ed. 1987); P. BIRKELAND & E. LARSON, *PUTNAM'S GEOLOGY* (5th ed. 1989).

210. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1226.

self-monitoring by hazardous waste landfill owners and operators²¹¹ and carefully reviewed the presence of six carcinogens in the groundwater beneath the landfill, several at levels exceeding maximum contaminant levels (MCLs) under the Safe Drinking Water Act.²¹²

Finally and most importantly, the court addressed remedies.²¹³ Subdividing its treatment of this issue into five parts — loss of interim status, corrective action, civil penalty, permanent closure, and attorneys' fees — the court candidly observed:

The matter of remedies presents the most troubling [of] issues in this case. Some of the issues, such as the loss of interim status and corrective action, present relatively little difficulty in light of the proven violations. The issues of the amount of civil penalties and the permanent closure sought by STOP, however, present thorny questions. No party has cited cases addressing those issues, and the court's research has disclosed none. This court appears to write on a clean slate with respect to these issues.²¹⁴

a. Loss of interim status

The *Environmental Waste Control* court concluded that "[Four County Landfill] lost its interim status to operate . . . on November 8, 1985 because it lacked the requisite insurance and an adequate groundwater monitoring system. Having lost interim status and lacking a final permit to operate a hazardous waste facility, EWC has no legal basis to continue its operation of the Four County Landfill."²¹⁵ The court reasoned that whatever form of prosecutorial discretion the EPA may exercise in assessing consent orders short of a loss of interim status under RCRA, when the EPA seeks a shutdown, the court should look to the statutory language and structure that "provide that hazardous waste facilities may operate only through a final permit . . . or interim status,"²¹⁶ neither of which the defendants possessed. Moreover, the court concluded that the defendants' purported "good faith" in making the Part A certification of interim compliance had no bearing on the remedy of loss of interim status. Even if it did have bearing, the court held that the defendants

211. *Id.*

212. *Id.* at 1227.

213. *Id.* at 1240.

214. *Id.*

215. *Id.* (citing *Vineland Chem. Co. v. United States Env'tl. Protection Agency*, 810 F.2d 402 (3d Cir. 1987)).

216. *Id.* (citing 42 U.S.C. § 6925(e)).

did not act "in good faith in failing to install a minimally adequate groundwater monitoring system by the deadline date."²¹⁷

b. Corrective action

As a remedy for the site's demonstrated release of hazardous waste constituents into the groundwater beneath the landfill, the court ordered that the corrective action plan, requested by EPA, be implemented by the defendants.²¹⁸ The court articulated the following rationale: "Time is of the essence in remedying such contamination; to await the passage of the contamination from the facility's boundaries simply compounds the difficulties. [O]ne need not await a catastrophe before ordering corrective action."²¹⁹ However, the court did not combine its order for implementation of a corrective action plan with the citizen group's request for the appointment of a special master to implement the plan because "the proposed plan require[d] EWC to report to EPA frequently."²²⁰

c. Civil penalty

In its most extensive discussion of remedial relief in *Environmental Waste Control*, the court imposed a \$2,778,000 civil penalty on the defendants jointly and severally.²²¹ In reaching this penalty assessment, the court rejected EPA's argument that pursuant to EPA's interpretation of RCRA's civil penalty provision,²²² "the [judiciary] should presume a penalty of \$25,000 per day to be reduced downward only upon a showing of mitigating considerations."²²³ Judge Miller noted that although the EPA may adopt regulations for its own administrative assessment of civil penalties, the agency "may not . . . impinge upon the discretion Congress has afforded the courts."²²⁴ Thus, a district court has discretion

217. *Id.* at 1241. The court also concluded that although "Indiana's regulatory agency found no insufficiency in the landfill's insurance coverage," and although 42 U.S.C. § 6926(d) provides that "[a]ny action by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter" this did not insulate the Landfill from RCRA liability "because the state took no action." *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 1242.

221. *Id.* at 1242-45.

222. 42 U.S.C. § 6928(g) (1988).

223. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1242 (citing Brief for EPA, at 48 n.23 (citations omitted)).

224. *Id.* (citing *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), *rev'd on other grounds*, 484 U.S. 49 (1987)).

to assess civil penalties under RCRA²²⁵ with Congress's guidance of discretionary factors in RCRA legislation.²²⁶ These two statutory factors are the seriousness of the violation and any good faith efforts to comply with applicable requirements.

The court viewed defendants' "illegal operation of a hazardous waste facility,"²²⁷ "placement of hazardous waste in unlined trenches,"²²⁸ and actions leading to the groundwater monitoring system's "continuing inadequacies"²²⁹ to be serious violations of RCRA. Because the purpose of civil penalties is to "provide a meaningful deterrence without being overly punitive,"²³⁰ the court assessed penalties of \$2,000 per day for the various RCRA violations determined earlier in the opinion.²³¹ In making this assessment,²³² the court concluded that the penalty should exceed the amount imposed in *United States v. T & S Brass and Bronze Works, Inc.* of \$1,000 per day "for considerably less egregious conduct,"²³³ but not more than \$2,000 per day because such penalties "would be overly punitive."²³⁴

d. *Permanent closure*

The district court stated that "[n]o reported case has considered the quantum of proof that should be required to close a facility permanently, rather than simply order the facility's owners and operators to comply with RCRA in the future and/or to take remedial action."²³⁵ Writing on a clean slate, the court sketched a tentative benchmark that something more than a simple violation of RCRA must be shown. "Such relief

225. *Id.* (quoting *United States v. T & S Brass and Bronze Works, Inc.*, 681 F. Supp. 314, 322 (D.S.C. 1988)).

226. *Id.* (citing 42 U.S.C. § 6928(a)(3)).

227. *Id.* (citing 42 U.S.C. § 6928(a)(3)).

228. *Id.*

229. *Id.* at 1243.

230. *Id.* at 1244.

231. *Id.* (citation omitted).

232. *Id.* at 1245.

233. *Id.* (citing *United States v. T & S Brass and Bronze Works, Inc.*, 681 F. Supp. 314 (D.S.C. 1988)).

234. *Id.*

235. *Id.* The court's annotated citations for this proposition stated:

See, e.g., *United States v. Charles George Trucking Co.*, 823 F.2d 685 (1st Cir. 1987) (defendant ordered to disclose information pursuant to RCRA and CERCLA); *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331 (4th Cir. 1983) (citizens obtained injunction requiring future compliance); *United States v. Clow Water Systems*, 701 F. Supp. 1345 (S.D. Ohio 1988) (corrective action order entered on summary judgment).

Id.

should be granted only in unusual, perhaps even extraordinary, cases.”²³⁶ The court recognized that mere technical violations — such as a failure to provide sufficient insurance, failure to provide required information to a regulatory body, or infrequent lapses of regulatory compliance — would make imposition of a permanent closure remedy extremely unlikely.²³⁷ The overwhelming record of persistent violations, delays, and misstatements to regulatory officials,²³⁸ however, coupled with examples of arguably reckless²³⁹ and intentional conduct²⁴⁰ led the court to conclude that ample reason for permanently closing the landfill existed. In the final analysis, the district court concluded that the defendants’ action and inaction “demonstrated an inability to operate a hazardous waste facility in sufficient compliance with RCRA to achieve [the] congressional purpose”²⁴¹ of eliminating “air pollution, subsurface leachate and surface run off” from land disposal practices in the nation.²⁴²

e. Attorneys’ fees

Instead of bringing suit under either of the citizen provisions of RCRA²⁴³ or CERCLA,²⁴⁴ STOP had technically intervened as of right in the EPA’s enforcement action in *Environmental Waste Control*.²⁴⁵

236. *Id.* at 1245-46.

237. *Id.* at 1246.

238. *Id.* at 1246-47.

239. The court stated:

EWC was forbidden from lateral expansion into unlined cells after May 8, 1985. Despite the lack of double-lined cells with leachate collection systems, EWC continued to accept hazardous waste after that date. EWC had no appropriate cells until August, 1986. Perhaps most significantly, Indiana warned EWC repeatedly to apply cover to exposed hazardous waste. EWC did so sporadically, if at all. As a result, hazardous waste lay uncovered, allowing carcinogenic hazardous waste constituents to be swept from the site into the surrounding area by wind and surface water.

Id. at 1246.

240. The court recognized:

At least one example undermines trust in EWC’s representations. The EPA Task Force examined the Landfill’s waste analysis plan in June, 1986 and found that parts of it were not being followed. The Task Force appears to have expressed concern regarding the procedures for sampling and analyzing waste in barrels, and EWC stated that it did not accept barrels in the future. Yet on October 11, 1988, more than two years later, [the citizen plaintiffs] videotaped Landfill personnel pushing barrels into a working cell.

Id. at 1246-47.

241. *Id.*

242. *Id.*

243. See 42 U.S.C. § 6972(a) (1988).

244. See *id.* § 9659(a).

245. The citizen group intervened pursuant to 42 U.S.C. § 9613(i).

The court concluded, nevertheless, that "citizen groups intervening as a matter of right [should] be able to recover their costs and attorneys' fees."²⁴⁶ The court predicated this remedial holding on "the common concern of RCRA and CERCLA with hazardous waste and the common purpose of each Act's authorization of attorneys' fees to promote citizen enforcement."²⁴⁷ The court declined to establish a reserve to pay costs for post-trial and appellate matters without legal authority or an evidentiary basis.²⁴⁸

2. *Controversial Views of Indiana "Toxic Torts" Law by the Seventh Circuit.* — In *City of Bloomington v. Westinghouse Electric Corp.*,²⁴⁹ the court affirmed the district court's Rule 12(b)(6) dismissal of Bloomington's second amended complaint which was based upon theories of nuisance, trespass, and abnormally dangerous activities for the alleged actions of Monsanto Company in contributing polychlorinated biphenyls (PCBs) contamination at a city-owned landfill, sewage treatment plant, and connected sewers.²⁵⁰ According to the complaint, Monsanto had sold PCBs to Westinghouse's Bloomington, Indiana factory where Westinghouse used the substances as an insulator in the manufacture of electrical capacitors. "Westinghouse waste containing PCBs was hauled to various Bloomington area landfills and small concentrations of PCBs also got into the sewer effluent of the Westinghouse plant."²⁵¹

246. *Environmental Waste Control, Inc.*, 710 F. Supp. at 1248.

247. *Id.*

248. *Id.*

249. 891 F.2d 611 (7th Cir. 1989).

250. *Id.* at 613.

251. *Id.* at 612-13. The court stated the elaborate procedural history of the case — worthy of full exposition — as follows:

In April 1981 the City of Bloomington, Indiana, and its Utilities Service Board (collectively "City") sued Westinghouse Electric Corporation for \$149,000,000 damages and equitable relief alleging Westinghouse discharged waste containing polychlorinated biphenyls (PCBs) into Bloomington's sewers and into its Winston-Thomas Sewage Treatment Plant. In October 1981 the City filed an amended complaint adding Monsanto Company as a defendant and also covering the presence of PCB waste at the City's Lemon Lane landfill. The amended complaint sought \$80,000,000 in damages and equitable relief from Monsanto. Proceedings were stayed in October 1983 to permit Westinghouse and the City to negotiate a settlement. The negotiations resulted in an agreement — referred to by the parties in the lower court as a consent decree — approved by Judge Dillin in August 1985.

In March 1986 the City filed its second amended complaint solely against Monsanto, reasserting liability under theories of public and private nuisance, trespass, abnormally dangerous activity, and negligence, and adding a willful and wanton misconduct count as well as three counts under the Racketeering Influenced Corrupt Organizations Act (RICO). The *ad damnum* was \$387,000,000.

Because the case arose as a diversity suit, the Seventh Circuit applied Indiana tort law to resolve the issue of whether the City had stated various "toxic tort"²⁵² causes of action.

a. Nuisance

A majority of the panel affirmed the district court's dismissal of the City's public and private nuisance counts based on precedent from a 1977 Indiana Court of Appeals decision which had stated that the essence of the tort of nuisance is one party "using his property to the detriment of the use and enjoyment of others."²⁵³ Yet, as recognized in Judge Cudahy's dissenting opinion,²⁵⁴ the majority's reliance on one state intermediate appellate court's isolated dicta to stand for an inflexible

On June 27, 1988, the district court handed down an opinion dismissing the counts of the second amended complaint based on nuisance, trespass, abnormally dangerous activity and RICO. Two days thereafter the district court denied leave to file a third amended complaint and a week thereafter the case went to trial on the negligence and willful and wanton misconduct counts contained in the second amended complaint. The jury found in favor of Monsanto and on July 18, 1988, judgment was entered in its favor.

The City has appealed basically on the ground that the trial evidence presented jury issues under the theories of nuisance, abnormally dangerous activity, and trespass, and that the trial court therefore erred in granting the defendant's Rule 12(b)(6) motion to dismiss these claims. If the City is right, it's entitled to a new trial. We conclude, however, that the City had no viable claim against Monsanto based on those theories and therefore affirm.

Id.

252. The field of toxic torts law has exploded in the past decade. During the last ten years a number of important books, articles, and judicial opinions have been published that attempt to define the nature of toxic torts. *See generally* M. SEARCY, 1 A GUIDE TO TOXIC TORTS § 1.01 (1989) ("Because of the scale and insidiousness of toxic injury, the application of traditional legal principles has been inadequate to compensate the injured victims in many cases. The legal system itself has therefore had to change in order to accommodate itself to the challenge of compensating these victims. In the 1980s, the law of toxic torts has come of age."); TOXIC TORTS AND PRODUCT LIABILITY: CHANGING TACTICS FOR CHANGING TIMES 11 (M. Brown ed. 1989) (toxic tort actions typically involve plaintiffs who "contend that they have sustained actual or potential physical injuries, emotional distress, property damages, and economic losses, which were caused by substances in the air, ground and water"); *Developments in the Law — Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1602-1603 (1986) (footnotes omitted) ("Compensation of toxic waste victims and deterrence of future personal injury stemming from exposure to hazardous substances present a serious challenge to our society. Hazardous waste sites are increasingly located in residential communities, and environmentally-induced cancers are now considered a major public health problem.").

253. *Westinghouse*, 891 F.2d at 614 (citing *Friendship Farms Camps, Inc. v. Parson*, 172 Ind. App. 73, 76, 359 N.E.2d 280, 282 (1977)).

254. *See id.* at 618 (Cudahy, J., dissenting).

“requirement” of Indiana nuisance law,²⁵⁵ without conducting meaningful review of Indiana’s expansive statutory provision on nuisance,²⁵⁶ was misplaced. The real reason for the *Westinghouse* majority’s result was probably based on a judicial policy assessment that it is inappropriate to hold “manufacturers [like Monsanto] liable for public or private nuisance claims arising from the use of their product subsequent to the point of sale.”²⁵⁷ The majority noted the absence of Indiana precedent on the question and referred to two federal court decisions applying New Hampshire law for the proposition that “manufacturers [are] not liable for nuisance claims arising from the use of their product subsequent to sale.”²⁵⁸

b. Trespass

The majority opinion in *Westinghouse* also affirmed the trial court’s dismissal of the City’s trespass claim against Monsanto.²⁵⁹ The court premised its ruling on Indiana’s adoption of the *Restatement (Second) of Torts* rule that imposes liability for trespass if the actor “intentionally . . . enters land in the possession of another, or causes a thing or a third person to do so”²⁶⁰ This rule led the court to conclude that “Monsanto did not deposit PCB wastes in City property nor did Monsanto instruct Westinghouse to do so. Therefore, any trespass was Westinghouse’s sole responsibility.”²⁶¹ The court’s analysis of intent, however, is subject to criticism for omission of any discussion about the character of an actor’s conduct sufficient to trigger a finding of intent. It is possible under traditional principles of tort law that the City could have adduced evidence to prove that Monsanto’s sale of PCBs to Westinghouse in significant quantities over the years would have led Monsanto decisionmakers to possess “substantial certainty” that the PCB wastes would be discharged in public disposal facilities. Under the *Restatement* ap-

255. *Id.* at 614.

256. As quoted by Judge Cudahy, *see supra* note 254, the Indiana Nuisance Statute states that “[w]hatever is injurious to the senses, or an obstruction of the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action.” IND. CODE ANN. § 34-1-52-1 (Burns 1986).

257. 891 F.2d at 614 (footnote omitted).

258. *Id.* at 614 n.4 (citing *City of Manchester v. National Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986) (asbestos); *Town of Hooksett School Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 133 (D.N.H. 1984) (asbestos)).

259. *Id.* at 615.

260. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 158(a) (1965) (emphasis in original)).

261. *Id.*

proach to intent, "substantial certainty" that a given act will result in certain unlawful consequences triggers a finding of intent.²⁶²

c. Abnormally dangerous activity

Although the court of appeals acknowledged that "Indiana recognizes the doctrine of strict liability stemming from carrying on an abnormally dangerous activity,"²⁶³ the majority opinion upheld the trial court's dismissal of this count based on lack of causation. The court stated that the harm to the City's sewage treatment plant and landfill was not caused by any abnormally dangerous activity of Monsanto, but by the buyer's failure to safeguard its waste.²⁶⁴

In dissent, Judge Cudahy criticized the majority for allowing the trial court to "eschew [] clear Indiana precedent adopting section 520 [of the *Restatement (Second) of Torts*] and instead created its own criteria, without any basis in Indiana law for assessing the adequacy of the City's abnormally dangerous activity claim."²⁶⁵ In closing, Judge Cudahy observed:

It seems to me that, on the basis of the majority opinion, sellers of toxic chemicals and other dangerous substances, simply by virtue of their commercial status, become insulated from any liability — except that cognizable under a negligence or product

262. See RESTATEMENT (SECOND) OF TORTS § 8A (1965). "The line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable person would avoid, and becomes in the mind of the actor a substantial certainty." W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON TORTS 36 (5th ed. 1984) (footnote omitted).

263. *Westinghouse*, 891 F.2d at 615 (citing *Enos Coal Mining Co. v. Schuchart*, 243 Ind. 692, 188 N.E.2d 406 (1963); *Erbrich Products Co., Inc. v. Wills*, 509 N.E.2d 850, 853 (Ind. Ct. App. 1987)).

264. *Id.*

265. *Id.* at 619 (Cudahy, J., dissenting). Judge Cudahy interpreted *Erbrich Products Co. v. Wills*, 509 N.E.2d 850, 853 (Ind. Ct. App. 1987) to require a court to decide on a case-by-case basis whether the factors in RESTATEMENT (SECOND) OF TORTS § 520 militated in favor of finding a particular activity as "abnormally dangerous." *Westinghouse*, 891 F.2d at 619 (Cudahy, J., dissenting). According to § 520:

Those factors are:

- (a) Existence of a high degree of risk of some harm to the person, land or chattels of another;
- (b) Likelihood that the harm that results from [the activity] will be great;
- (c) Inability to eliminate the risk by the exercise of reasonable care;
- (d) Extent to which the activity is not a matter of common usage;
- (e) Inappropriateness of the activity to the place where it is carried on; and
- (f) Extent to which its value to the community is outweighed by its dangerous attribute.

RESTATEMENT (SECOND) OF TORTS § 520 (1965).

liability theory — beyond the point of sale for any of their activities occurring either before or after the sale. . . . This seems to me a potentially dangerous precedent, [and] one inconsistent with Indiana law.²⁶⁶

The dissent was particularly troubled because there were extensive allegations regarding Monsanto's involvement "in events subsequent to the [PCB] sale" ²⁶⁷

3. *Federal Court Review of Remedial Action Proposed at a Superfund Site is Barred.* — In *Schalk v. Reilly*,²⁶⁸ which involved another aspect of waste problems addressed in *City of Bloomington v. Westinghouse Electric Corp.*,²⁶⁹ citizens brought actions to challenge a consent decree between Westinghouse and the EPA "to clean up hazardous waste sites in and around Bloomington, Indiana."²⁷⁰ Focusing its attention on section 113(h)(4) of CERCLA, the United States Court of Appeals for the Seventh Circuit held that the federal courts lack subject matter jurisdiction to consider challenges to remedial actions that have not yet been completed.²⁷¹ Adopting the reasoning of the Eleventh Circuit, the court agreed that

[t]he plain language of the statute indicates that Section 113(h)(4) [allowing a citizen suit under 42 U.S.C. § 9659 to proceed in certain circumstances] applies only after a remedial action is actually completed. This section refers in the past tense to remedial actions *taken* under Section 104 or secured under 106. Absent clear legislative intent to the contrary, this language is conclusive.²⁷²

Moreover, the court was also persuaded that the "relevant legislative history supports the conclusion that federal courts are deprived of subject matter jurisdiction where remedial action has not yet been completed."²⁷³ In addition, the court concluded that ample opportunity for public comment and involvement was provided regarding Westinghouse's proposal to incinerate hazardous waste as part of necessary Superfund remedial action.²⁷⁴

266. *Westinghouse*, 891 F.2d at 619-20.

267. *Id.* at 619.

268. 900 F.2d 1091 (7th Cir. 1990).

269. 891 F.2d 611 (7th Cir. 1989). *See supra* notes 249-67 and accompanying text.

270. *Schalk*, 900 F.2d at 1092.

271. 42 U.S.C. § 9613(h) (1988).

272. *Schalk*, 900 F.2d at 1095 (quoting *Alabama v. EPA*, 871 F.2d 1548, 1557 (11th Cir. 1989) (emphasis in original)).

273. *Id.* at 1096.

274. *Id.* at 1097. Less extensive portions of the opinion rejected the plaintiffs'

4. *Judicial Consideration of a Motion for Judgment on the Evidence in a Toxic Tort Suit Must Not Compare Evidence.* — In *Sipes v. Osmose Wood Preserving Co.*,²⁷⁵ the Supreme Court of Indiana reversed the court of appeals's and the trial court's approval of a Trial Rule 50 motion for judgment on the evidence.²⁷⁶ The case involved a toxic tort suit against a chemical company for negligence, strict liability, and failure to warn²⁷⁷ based on allegations that the plaintiff "became extremely ill subsequent to sawing wood treated with a chemical compound of chromium, copper and arsenic (CCA)"²⁷⁸ manufactured by the defendant corporation.

The supreme court recognized that although the court of appeals had cited the correct test for ruling on a Trial Rule 50 motion,²⁷⁹ the court of appeals applied the law incorrectly in upholding dismissal of plaintiff's punitive damage claims by weighing all the evidence relevant to punitive damages.²⁸⁰ After reviewing a variety of evidence in the record on the issue of whether the defendant corporation "consciously and intentionally engaged in misconduct, knowing that such misconduct would probably result in injury" to others,²⁸¹ the supreme court articulated the correct application of the law to the facts of the underlying motion:

Judgment on the evidence is proper only when there is no probative evidence or reasonable inferences which could support a judgment. [Plaintiff] presented probative evidence, though people could differ as to the result on the issue of punitive damages. Judgment on the evidence was therefore improper; the issue of punitive damages should have been presented to the jury.²⁸²

argument that subject matter jurisdiction existed under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1988), to consider the EPA's failure to perform an Environmental Impact Statement (EIS). The court rejected this claim, citing a United States Supreme Court decision, *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984), for the proposition that "review is not available when a federal statute specifically precludes judicial review." *Shalk*, 900 F.2d at 1097. The court gave scant attention to further assertions that plaintiffs' "Fifth Amendment rights to substantive and procedural due process, meaningful access to the courts, and equal protection" were violated, characterizing the arguments as "novel theories [that] rest on undesirable expansions of the meaning of the Fifth Amendment. . . ." *Id.* at 1098.

275. 546 N.E.2d 1223 (Ind. 1989).

276. *Id.* at 1226.

277. *Id.* at 1224.

278. *Id.*

279. *Id.* at 1224-25. *Jones v. Gleim*, 468 N.E.2d 205 (Ind. 1984), describes the appellate standard for reviewing grants of Trial Rule 50 motions.

280. *Sipes*, 546 N.E.2d at 1225.

281. *Id.*

282. *Id.* at 1226.

5. *EPA May Regulate Sites with Injection Wells Under RCRA.* —

In a remarkable decision at the intersection of several federal environmental statutes, Circuit Judge Richard Posner wrote an opinion for the United States Court of Appeals for the Seventh Circuit in *Inland Steel Co. v. EPA*.²⁸³ Two steel companies — Inland Steel Co. and Bethlehem Steel Corp. — challenged orders by the EPA requiring them to take corrective action under RCRA at steel manufacturing facilities in Northern Indiana.²⁸⁴ In rejecting their challenge, and upholding EPA's corrective action orders, the court of appeals held that RCRA regulation did not exempt the deep injection wells used by the steel makers for disposal of unwanted hazardous by-product liquid wastes.²⁸⁵ The linchpin of the court's holding was that the RCRA exemption was inapplicable; although the steel companies had water discharge permits for their injection wells, they were not, according to the court, "*required* by the Clean Water Act to have . . . permit[s]."²⁸⁶

Judge Posner's opinion is a valuable addition to environmental jurisprudence on two levels: first, general observations about hazardous waste regulation and reality; and, second, specific analysis of ostensibly conflicting environmental policies regarding different environmental media. On the general level, the court's opinion acknowledges the apparent complexity of the problem presented: "The legal and technical matrix in which this challenge is embedded is immensely complex" ²⁸⁷ Yet, in setting the stage for its analysis, the court indicated that the "complexities are irrelevant" and that the court will resolve the issues by "simplify[ing] ruthlessly."²⁸⁸ In this Alexandrian spirit,²⁸⁹ the court described that the steel companies' real motivation was to attempt to avoid the extremely expensive EPA corrective action orders on inactive waste management units on their property, even though the EPA had no plans to restrict the operation of the deep injection wells themselves.²⁹⁰ Moreover, Judge Posner's opinion trenchantly points out the unrealistic nature of the steel companies' argument that being issued past deep well injection permits under the Clean Water Act makes them exempt from RCRA.

283. 901 F.2d 1419 (7th Cir. 1990).

284. The EPA's corrective action order was issued pursuant to 42 U.S.C. § 6924(u) (1988).

285. *Inland Steel Co.*, 901 F.2d at 1422.

286. *Id.* (emphasis in original).

287. *Id.* at 1420.

288. *Id.*

289. The Gordian Knot was an intricate knot tied by King Gordius of Phrygia and cut by Alexander the Great with his sword after hearing an oracle promise that whoever could undo it would be the next ruler of Asia. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 568 (1969).

290. *Inland Steel Co.*, 901 F.2d at 1421.

According to the court, "[t]he companies have *begged* Indiana to continue including the deep injection wells in the permits that it periodically renews, though the state has no desire to include them because it does not think that these particular wells" need a Section 402 permit.²⁹¹

On the specific level of analysis, the *Inland Steel* decision is noteworthy in several important respects. Initially, the court framed the ostensible conflict between the Clean Water Act and RCRA as follows:

We are in a Statutory Cloud Cuckoo Land in which "solid waste" expressly includes liquid wastes. 42 U.S.C. § 6903(27). This same subsection, however, contains the statutory language on which the companies do rely: "The term 'solid waste' . . . does not include . . . solid or dissolved materials in . . . industrial discharges which are point sources subject to permits under" Section 402 of the Clean Water Act, 33 U.S.C. § 1342. The companies argue that the wastes that they pump into their deep injection well is a point source within the meaning of the Clean Water Act because pollutants might be discharged from them. 33 U.S.C. § 1362(14). If they are right on both counts and therefore subject to the permit requirements of Section 402 of the Clean Water Act, then the wells are not solid waste disposal facilities and are not regulable under the Resource Conservation and Recovery Act.²⁹²

In resolving this statutory tension between RCRA and the Clean Water Act, the court engaged in pragmatic policy analysis. The court noted that the Clean Water Act does not exempt from RCRA a form of waste disposal that poses any environmental hazard to a part of the environment other than to the navigable waters of the United States.²⁹³ The court observed that

[t]he purpose of the [RCRA] exemption . . . is to avoid duplicative regulation, not to create a regulatory hole through which billions of gallons of hazardous wastes be pumped into the earth without any controls provided they are pumped deeply enough to endanger neither navigable waters nor the supply of drinking water, the latter being protected by the Safe Drinking Water Act, 42 U.S.C. §§ 300f *et. seq.*²⁹⁴

The court justified its focus on practicality in the final paragraph of its opinion:

291. *Id.* See 33 U.S.C. § 1342 (1988).

292. *Inland Steel Co.*, 901 F.2d at 1421-22.

293. *Id.* at 1423.

294. *Id.*

Regulation is not a seamless whole, and when the seam reflects a compromise we are duty-bound to honor it if constitutional. . . . But we can find no indication that Congress intended to exempt the owners of deep injection wells from regulation under [RCRA], and the language of the Act does not so compellingly prescribe such a result that we must do or die without reasoning why. If the language does not compel, neither is it deformed by the EPA's interpretation, to which we owe some, perhaps considerable, deference²⁹⁵

6. *City's Decision to Place Landfill Off Limits for City Garbage Upheld.* — In a short but strongly worded opinion, Judge Easterbrook, writing for the United States Circuit Court of Appeals for the Seventh Circuit in *Northside Sanitary Landfill, Inc. v. City of Indianapolis*,²⁹⁶ rebuffed the landfill's due process challenge to the city's decision not to have its waste haulers deposit city garbage at the landfill in question. In an opening salvo foreshadowing the result, the court opined: "Despite constant reminders that a federal court is not a Board of Zoning Appeals, persons disappointed with local land-use decisions persist in seeking new avenues of review."²⁹⁷ Examining the rationality of Indianapolis's action under the rational basis due process test, the court concluded:

Indianapolis told waste haulers to stop using Northside because chemicals from refuse dropped off there might seep into the water supply. Leakage was the reason for its placement on the National Priorities List. Indianapolis . . . also fears that as a former user of Northside's services, it is potentially liable for cleanup costs at the site, and it does not want these costs to mount. These are rational grounds for governmental action. Northside wanted the district court to hold a trial to determine whether these are the real reasons Indianapolis put its dump off limits, but governmental action passes the rational basis test if a sound reason may be hypothesized. The government need not prove the reason to a court's satisfaction.²⁹⁸

After disposing of the constitutional issue, the Seventh Circuit indicated a willingness to consider appropriate sanctions in environmental cases when a party "appears to be pursuing a common tactic of multiplying litigation in order to buy time — and perhaps to make matters so costly for its adversaries that they will cave in."²⁹⁹

295. *Id.* at 1424 (citations omitted).

296. 902 F.2d 521 (7th Cir. 1990).

297. *Id.* at 522 (citations omitted).

298. *Id.*

299. *Id.* at 523.

7. *Seller Not Liable for Breach of Warranty of Habitability for Conveying Home Insulated with Urea Formaldehyde.* — In the recent Indiana Court of Appeals decision *Kaminszky v. Kukuch*,³⁰⁰ the court refused to hold a seller liable for breach of an implied warranty of habitability in a toxic tort suit brought by a couple trying to have the sale of their house rescinded after they discovered it was insulated with urea formaldehyde.

Tibor and Judit Kaminszky purchased the house from Abel Kukuch in 1985. Prior to the purchase, the Kaminszkys inspected the house three times. During one inspection, they saw insulation similar to the insulation in their previous home, but they did not specifically ask what type of insulation the purchased house contained. Before the sale, Kukuch had rented the house to tenants. In 1978, he hired a contractor to install insulation. Kukuch testified that he relied on the contractor's expertise to use the best insulation available, and that he was not informed what type of insulation was used.³⁰¹

After the sale, the buyers experienced skin irritation and dizziness. While cleaning the house, they discovered an access panel covered with wallpaper, which on closer examination revealed a different type of insulation than what they had earlier observed. Testing revealed that it was urea formaldehyde foam insulation.

The Kaminszkys initiated suit alleging mutual mistake and that Kukuch had breached the implied warranty of habitability and failed to disclose key facts.³⁰² The buyers sought rescission and damages. The Lake County Superior Court ruled in favor of the buyers, and the sellers appealed.³⁰³

The Indiana Court of Appeals noted that the implied warranty of fitness in the sale of a new house has evolved in various judicial decisions from liability for a builder-vendor to the immediate purchaser, and was then extended to encompass subsequent purchasers.³⁰⁴ The court completed its review by rejecting the buyers' argument that the seller should have disclosed the presence of the formaldehyde insulation, finding that the seller had relied on an installer to use the best insulation available.³⁰⁵

B. Administrative Law

1. EPA May Not Base Enforcement Action on a Memorandum

300. 553 N.E.2d 868 (Ind. Ct. App. 1990).

301. *Id.* at 869.

302. *Id.* at 870.

303. *Id.*

304. *Id.*

305. *Id.*

Not Promulgated Within Appropriate Notice and Comment Formalities.

— In *United States v. Zimmer Products, Inc.*,³⁰⁶ the district court invalidated the EPA's reliance upon an agency guidance memorandum to establish air violations for a paper manufacturer.³⁰⁷ After the Indiana State Implementation Plan (SIP) had been approved by the EPA, the agency distributed what it characterized as an "internal memorandum" to the chiefs of the Air Programs branch in EPA regional offices. The memorandum — authored by Richard Rhoads, Director of EPA's Control Programs Development Division (Rhoads memo) — articulated the difficulties that the EPA had experienced in assuring compliance with air emission limitations in the paper industry when using certain control equipment. To alleviate these problems, the Rhoads memo instructed EPA regional offices that units of emissions in mass volatile organic compounds (VOC) per volume of coating "*cannot* be used."³⁰⁸ Rather, emission limitations "must be based on mass VOC per volume of *solids* consumed."³⁰⁹

Zimmer Paper Products runs a manufacturing plant in Indianapolis which coats, prints, and cuts paper for food packaging over-wrap and labels. After an EPA inspection in 1987, Zimmer was given a notice of violation for failure to comply with Indiana's SIP; later, the EPA commenced an action against Zimmer for injunctive relief and civil penalties.³¹⁰

In opposition to Zimmer's argument that the Rhoads memo was actually being relied upon by the EPA as a legislative rule, the government contended that the memo was a "policy statement" or "interpretative rule" which clarified how to determine whether add-on controls, such as incinerators, could conform with Indiana's emissions limitations. In other words, the EPA argued that the memo was merely intended to provide guidance with the emissions limitations and was not a substantive change to those limitations.³¹¹

The district court, on cross-motions for summary judgment, ruled for Zimmer because the Rhoads memo made two substantive changes in the regulations which had the effect of imposing more stringent requirements on Zimmer.³¹² First, the memo changed the requirements under the applicable air emissions standard by requiring that emissions be measured in units of "volumes of [coating] solids consumed" rather

306. 30 Env't Rep. Cas. (BNA) 2093 (S.D. Ind. 1989).

307. *Id.* at 2100.

308. *Id.* at 2094 (emphasis in original).

309. *Id.* (emphasis in original).

310. *Id.*

311. *Id.* at 2094-95.

312. *Id.* at 2100.

than in pounds of VOC per gallon of coating solution.³¹³ Second, the court construed the memo to require that if add-on equipment was used to achieve compliance, then the emissions must be equivalent to those attainable by using a higher solids/low solvent coating.³¹⁴ Indeed, the court concluded that EPA's Rhoads memo represented "a real change on the regulatory approach — recognized as such by agency officials — rather than a mere interpretation of existing regulations."³¹⁵

C. Natural Resources

1. *The Department of Natural Resources is Entitled to Recover on Behalf of the State a Full Measure of Natural Resources Damages During Time of Illegally Imposed Injunction.* — Because natural resources damages are taking center stage in current hazardous waste cleanup actions under CERCLA,³¹⁶ the Indiana judiciary's analysis in *Ridenour v. Furness*³¹⁷ is instructive. This case is but a part of a multi-year saga that has taken place in Indiana between the director of the State Department of Natural Resources (DNR) and commercial perch fishermen of Lake Michigan. In the dispute that led to the appellate court opinion at bar, the fishermen successfully enjoined the DNR's enforcement of an administrative ban on gill nets.³¹⁸ On appeal, the DNR prevailed and the injunction against enforcing the gill net ban was dissolved.³¹⁹

The DNR filed a new application in the trial court which sought "to recover damages it [had] suffered because of the erroneous injunction."³²⁰ In particular, "the DNR sought damages for the value of the salmon and trout incidentally caught and destroyed by those fishermen who continued to fish with gill nets during the period of the erroneous injunction."³²¹ Moreover, "the DNR sought as damages the amount of

313. *Id.* at 2096.

314. *Id.*

315. *Id.* at 2098.

316. See, e.g., *Ohio v. Interior Dep't*, 880 F.2d 432 (D.C. Cir. 1989).

317. 546 N.E.2d 322 (Ind. Ct. App. 1989).

318. *Id.* at 324.

Gill fishing nets are commonly deployed by commercial fishermen in order to catch perch fish. A gill net also incidentally catches a variety of other fish as well, however. Following several years of study DNR fisheries biologists concluded that immature chinook salmon and lake trout dominated the catch of fish incidentally caught and destroyed in the gill nets utilized by commercial perch fishermen. As a result of the monitoring studies, the DNR promulgated an emergency order . . . temporarily banning the use of gill fishing nets by commercial fishermen. . . .

Id.

319. *Id.* (explaining the procedural history of the case).

320. *Id.*

321. *Id.*

profits on the harvest of perch fish earned by the fishermen while under the protection of the injunction.”³²² After entering a partial summary judgment against DNR on the perch profit element of damages, the trial court heard evidence at a bench trial on the issue of the damages sustained from the incidental catch of sport fish. On the basis of hatchery production cost testimony and estimated mortality of the sport fish, the trial court assessed natural resources damages in the amount of \$1,906.16.³²³

The DNR argued three issues on appeal: first, whether the trial court correctly assessed damages for the sport fish destroyed during the period of the erroneous injunction; second, whether the DNR is entitled to recover fishermen’s profits on the perch harvest during the erroneous injunction; and, third, whether the trial court erred in failing to apportion damages between the fishermen.³²⁴

a. Destruction of sport fish

Observing that “damages for the total destruction of personal property [including animals] are measured by the fair market value of the property at the time of the loss,”³²⁵ the court of appeals recognized that a problem exists when no market value exists for the property destroyed.³²⁶ Analogizing the matter of unlawful destruction of sport fish to a litigant who suffered a wrongful imposition of an injunction for harvesting a wheat crop,³²⁷ the court held that the lower court failed to take into account the fish’s “development time.” Accordingly, the court expanded the DNR’s scope of damages to encompass feeding costs in raising fish in a hatchery until they reached a ten to fourteen-inch size.³²⁸ The court specifically noted that its holding does not suggest that the cost of ecological protection of the fish habitat is a measurable element of damage or that it may be computed as part of DNR’s recoverable damages.³²⁹

b. Perch

The court of appeals disagreed with the trial court’s conclusion that “profits earned from the catch of perch were not an element of damages recoverable by the DNR for having been wrongfully enjoined.”³³⁰ An-

322. *Id.*

323. *Id.* at 325.

324. *Id.*

325. *Id.* (citations omitted).

326. *Id.* at 326.

327. *Id.* (citing *Ross v. Felter*, 71 Ind. App. 58, 123 N.E. 20 (1919)).

328. *Id.* at 327.

329. *Id.* at 327 n.3.

330. *Id.* at 327.

ticipating the Indiana Supreme Court's decision in *Ralston v. Lake Superior Court*,³³¹ the court analyzed the issue as follows:

[F]ishermen have no constitutional or statutory right to the fish in the Indiana waters of Lake Michigan. Rather, fishermen can fish in Lake Michigan only by virtue of annual licenses bestowed by the DNR. . . . There is indication that the commercial fishermen could have caught some perch through the use of alternative fishing methods. Thus, the damages recoverable by the DNR would be the difference in profits the fishermen received for the perch harvested with the use of gill nets and the profits the fishermen could receive for the perch harvested using alternative fishing methods and technology. The fishermen would be entitled to diminish the amount of damages recoverable by the DNR, however, only if they come forward with information that they could have legitimately captured some perch through the use of equipment other than the gill nets and the profits they would have derived therefrom.³³²

c. Apportionment

Finally, the appellate court reversed the trial court's holding of joint and several damages. The court noted that "the damages caused by each defendant can be ascertained without difficulty," and that the "trial court erred in failing to apportion the award of damages between the fishermen."³³³

2. *Commercial Fishermen Possess No Property Rights in Fish Which Vest Them With Standing to Seek Injunction Against DNR's Gill Net Fishing Regulations.* — In *Ralston v. Lake Superior Court*³³⁴ — a case related to *Ridenour v. Furness*³³⁵ — the Indiana Supreme Court reviewed a continuing dispute between commercial fishermen and the DNR regarding a past gill net order.³³⁶ The court noted that the trial court erred in holding the DNR director in contempt for not following a prohibitory injunction restraining enforcement of a 1983 emergency gill net regulation because the matter became moot when the DNR regulation expired at the end of 1983.³³⁷ The supreme court then articulated and

331. 546 N.E.2d 1212 (Ind. 1989).

332. *Ridenour*, 546 N.E.2d at 327-28 (citation omitted).

333. *Id.* at 328.

334. 546 N.E.2d 1212 (Ind. 1989).

335. 546 N.E.2d 322 (Ind. Ct. App. 1989).

336. *Ralston*, 546 N.E.2d at 1214.

337. *Id.*

reinvigorated a long-dormant principle that should discourage the proliferation of lawsuits by commercial fishermen against the DNR. According to the court: "[The fisherman] possessed no property right that vests him with standing to seek an injunction against the Department's regulations. He has no property interest in the fish. The fish belong to all the people."³³⁸

IV. CONCLUSION: A VIEW TOWARD THE FUTURE

In sum, Indiana lawmakers, joined by state and federal judges, have crafted numerous important policy changes in environmental law during the review period. Based on past developments, the following trends in Indiana law and policy are probable.

1. Solid waste management and planning will cause major disruptions and costs to Indiana's local governments. Given the natural inclination to avoid doing what one does not have to do, it seems likely that several solid waste planning districts will delay implementing needed changes in solid waste facilities, taxes, and recycling policies. Therefore, the problem will likely be shifted back to the General Assembly within the next few years. The General Assembly will probably respond with mandatory recycling, required waste reduction, and landfill bans, continuing the evolution of solid waste planning in the state.

2. Political pressure on Congress will likely persist for passage of federal legislation allowing states to limit or ban certain categories of interstate waste. Without the ability to bar or control interstate waste shipments, states such as Indiana will be frustrated in effective solid waste planning and management due to uncertainties caused by fluctuations in the type and quantity of solid waste coming into the state from beyond its borders.

3. Toxic tort lawsuits will continue to befuddle the courts. Until the legislature decides to regulate personal and property injuries caused by exposure to toxic substances, courts will have to decide whether exposure to insidious, and often unseen, substances over long periods of time are actionable under traditional common law theories. In a related way, courts will be increasingly asked to meld common law compensatory remedies with legislatively sanctioned judicial remedies for cleanup of abandoned hazardous waste sites. Legislative change at the state or federal levels may have a significant impact on this area of the law.

4. The Indiana judiciary will be asked to apply the public trust doctrine to the state's water-related natural resources such as sand, lakebed, and other resources. In support of this argument, the courts

338. *Id.* (citing *Smith v. State*, 155 Ind. 611, 58 N.E. 1044 (1990)).

will be presented with persuasive authority from other jurisdictions that have adopted the public trust doctrine.³³⁹

339. Public trust law recognizes that "some types of natural resources are held in trust by government for the benefit of the public. These resources are protected by the trust against unfair dealing and dissipation, which is classical trust language suggesting the necessity for procedural correctness and substantive care." The first steps in analysis "require an understanding of what public resources are committed perpetually to what public uses."

RODGERS, *supra* note 1, at 158 (footnotes omitted). See generally Note, *Indiana's Lake Michigan Shoreline: Recommended Shoreland Regulations for a Valuable Natural Resource*, 25 VAL. U.L. REV. 99 (1990).

Environmental Rulemaking in Indiana: The Impact of the Substantial Difference Requirement on Public Input

MARCIA J. ODDI*

I. INTRODUCTION

The rules adopted by Indiana's environmental boards are of major importance to both the regulated community and the public at large. It is through these rules that programs authorized by statutes such as the federal Clean Air Act, the Safe Drinking Water Act, and the Resource Conservation and Recovery Act are implemented at the state level.¹ It is also through these rules that state programs with no current federal involvement, such as those concerning the management of solid (nonhazardous) waste, are put into operation.

Rulemaking in Indiana is a legislative process. As such, the public input of information from the broadest base possible prior to the shaping of the final language of the rule is essential.² However, for the reasons described in this Article, the environmental boards frequently may be reluctant to publish the text of a proposed rule and to schedule it for public hearing and comment until the language of the rule has been finalized. After such publication, the boards may hesitate to change a proposed rule because such change may necessitate another round of rulemaking. Thus, the prepublication rule development stage takes on major significance; it may become the stage in the rulemaking process in which public input is the most effective. When that is the case, it is essential that the prepublication rule development process be open, rather than selective.

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1. 42 U.S.C.A. §§ 7401-7642 (West 1983); 42 U.S.C.A. §§ 300f to 300n-6 (West 1982); 42 U.S.C.A. §§ 6901-6907 (West 1983). "These acts and their reauthorization amendments contain a unique partial preemption scheme which environmental enforcement agents refer to as primacy. This technique attempts to encourage states to implement the provisions of the acts by applying for primary enforcement responsibility. In order to receive this delegation of authority (or authorization), state laws [rules] must be at least as stringent as the applicable federal statutes [regulations]." Lester, *Implementation of the Resource Conservation and Recovery Act of 1976: The Role of the States*, THE BOOK OF THE STATES 406 (1988-89).

2. See Brown, *The Overjudicialization of Regulatory Decisionmaking*, 5 NAT'L RESOURCES & ENV'T 20 (1990).

II. THE PROCEDURAL PROCESS OF ENVIRONMENTAL RULEMAKING

A. *The Statutory Framework*

1. *The Environmental Rulemaking Entities.*—In 1985, the Indiana General Assembly created a separate state environmental agency, the Indiana Department of Environmental Management, repealed the three then-existing environmental boards, and replaced them with the Air Pollution Control Board, the Water Pollution Control Board, and the Solid Waste Management Board.³ Each Board was granted rulemaking authority by statute:⁴

The [air pollution control] board shall adopt rules under IC § 4-22-2 consistent with the general intent and purposes declared in section 1 of this chapter [Indiana Code sections 13-1-1-1 to 13-1-1-24] and necessary to the implementation of the Federal Clean Air Act (42 U.S.C. 7401 et seq.), as amended.⁵

The [water pollution control] board shall adopt rules for the control and prevention of pollution in waters of this state with any substance which is deleterious to the public health or to the prosecution of any industry or lawful occupation, or whereby any fish life or any beneficial animal life or vegetable life may be destroyed or the growth or propagation thereof prevented or injuriously affected. The board may adopt rules under IC § 4-22-2 that are necessary to the implementation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), in effect January 1, 1988, and the Safe Drinking Water Act (42 U.S.C. 300f et seq.), in effect January 1, 1988, except as provided in IC 13-8.⁶

[The solid waste management board shall] adopt rules under IC 4-22-2 to regulate solid and hazardous waste and atomic radiation in Indiana, including rules necessary to the implementation of the Federal Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.), as amended⁷

The Department of Environmental Management itself was granted no rulemaking authority in the authorizing statute. Rather, its responsibilities were made executive in nature:

3. Act of Apr. 19, 1985, Pub. L. No. 143-1985, 1985 Ind. Acts 1074.

4. The following is not intended to be an exhaustive listing of the statutory provisions granting rulemaking authority to the environmental boards.

5. IND. CODE § 13-1-1-4(c) (1988).

6. *Id.* § 13-1-3-4(a).

7. *Id.* § 13-1-12-8(a)(1).

The department shall assure accomplishment of the comprehensive, long-term programs established by the boards.⁸

The department shall procure compliance with standards and rules adopted by the boards.⁹

The department shall follow the operating policies established in rules adopted by the boards.¹⁰

The commissioner shall enforce rules consistent with the purposes of IC 13-1-1, IC 13-1-3, IC 13-1-5, IC 13-1-5.5, IC 13-1-5.7, IC 13-1-12, and IC 13-9-30.¹¹

2. *Statutory Rulemaking Authority.*—The general statutory framework for rulemaking in Indiana, applicable to all state agencies, is set out at Indiana Code section 4-22-2. These requirements, plus supplemental requirements found in the environmental management law at Indiana Code section 13-7-7, govern rulemaking by the three environmental boards.¹²

In general, under Indiana Code section 4-22-2, a proposal for a new rule *initially becomes public* when the agency with rulemaking authority (which is, for the purposes of this Article, the “board”) notifies the public of its intent to adopt a rule: (1) by publishing notice of a public hearing in one newspaper of general circulation in Marion County, and (2) by publishing notice of a public hearing and the full text of the agency’s proposed rule in the *Indiana Register*. All of the publication requirements must be met at least twenty-one days before the date of the public hearing.¹³ As for the public hearing itself:

The agency may conduct the public hearing in any informal manner that allows for an orderly presentation of comments and avoids undue repetition. However, the agency shall afford any person attending the public hearing an adequate opportunity to comment on the agency’s proposed rule through the presentation of oral and written facts or argument.¹⁴

Indiana Code section 13-7-7-4 imposes three additional requirements at this point in the environmental rulemaking process. Hearings on substantive proposed rules with state-wide impact are to be held in more than one place, and, in addition to the Marion County notice, newspaper notice at least twenty-one days prior to the scheduled hearing is required to be

8. *Id.* § 13-7-3-4.

9. *Id.* § 13-7-3-5.

10. *Id.* § 13-7-3-11.

11. *Id.* § 13-7-3-12.

12. *Id.* § 13-7-7-1(a). “The boards may adopt, repeal, rescind, or amend rules and standards by proceeding in the manner prescribed in IC 4-22-2.” *Id.*

13. *Id.* § 4-22-2-24.

14. *Id.* § 4-22-2-26(c).

given in a newspaper of general circulation in any other area of the state where a hearing is to be held.¹⁵ All hearings on proposed rules are to be open to the public, any person is to be provided a reasonable opportunity to be heard with respect to the subject of the hearing, all testimony is to be recorded, and the transcript of the hearing and any written submissions must be open to public inspection and copying.¹⁶ Finally, any interested person is to be given written notice of the action of the board with respect to the subject of the hearing.¹⁷

The general statute, Indiana Code section 4-22-2-15, does not limit performance of the *preliminary* steps in the rulemaking process to the agency charged with rulemaking authority. Rather, it provides:

Any rulemaking action that this chapter allows or requires an agency to perform, other than final adoption of a rule . . . , may be performed by an individual or group of individuals with the statutory authority to adopt rules for the agency, a member of the agency's staff, or another agent of the agency. Final adoption of a rule . . . may be performed only by the individual or group of individuals with the statutory authority to adopt rules for the agency.

In addition, Indiana Code section 13-7-7-1(c) provides:

A board may designate by resolution a single member of the board, or any other individual, to hold a hearing on behalf of the board on any proposed rule. A person conducting a hearing under this subsection shall report to the board his findings and recommendations, and the appropriate order thereon shall be entered by the board after review of those findings and recommendations.¹⁸

Once the public hearing has concluded and the rule proposal is to be considered for final adoption, the general rulemaking statute provides:

[T]he individual or group of individuals who will finally adopt the rule under section 29 of this chapter shall fully consider

15. *Id.* § 13-7-7-4(a). Note that this section requires that "the department" give notice, while Indiana Code § 4-22-2-24(b) places this responsibility on the "agency" that is charged with rulemaking authority.

16. *Id.* § 13-7-7-4(b).

17. *Id.* § 13-7-7-4(c).

18. Failure of the environmental board to comply with the procedural requirement of Indiana Code § 13-7-7-1(c) that the board representative presiding at the public hearings report his findings and recommendations to the full board prior to board adoption of the rule caused the Indiana Court of Appeals to invalidate the rule at issue in *Indiana Env't'l. Mgmt. Bd. v. Indiana-Kentucky Elec. Corp.*, 181 Ind. App. 570, 393 N.E.2d 213 (1979).

comments received at the public hearing required by section 26 of this chapter and may consider any other information before adopting the rule. Attendance at the public hearing or review of a written record or summary of the public hearing is sufficient to constitute full consideration.¹⁹

Except for consideration of the public comments, and of any comments or alternatives suggested by the state department of commerce,²⁰ the general rulemaking statute imposes no further obligations on the agency prior to final adoption.

Unless required by statute to consider specific factors, make written comments or findings of fact, or otherwise state the basis or purpose of its rule, any agency may adopt a rule without declaring:

- (1) the facts or argument on which the agency has based the rule; or
- (2) the purposes that the agency intends to accomplish by adopting the rule.²¹

The environmental boards, however, are required by statute at Indiana Code section 13-7-7-2(b) to take certain specified factors into account:

In adopting rules and establishing standards, a board shall take into account:

- (1) all existing physical conditions and the character of the area affected;
- (2) past, present, and probable future uses of the area, including the character of the uses of the surrounding areas;
- (3) zoning classifications;
- (4) the nature of the existing air quality or existing water quality, as the case may be;
- (5) technical feasibility, including the quality conditions that could reasonably be achieved through coordinated control of all factors affecting the quality; and

19. IND. CODE § 4-22-2-27 (1988).

20. *Id.* § 4-22-2-28. "[T]he agency that intends to adopt the proposed rule shall respond in writing to the department of commerce concerning the department's comments or suggested alternatives before adopting the proposed rule" *Id.*

21. *Id.* § 4-22-2-30.

(6) economic reasonableness of measuring or reducing the particular type of pollution.

The boards shall take into account the right of all persons to an environment sufficiently uncontaminated as not to be injurious to human, plant, animal, or aquatic life or to the reasonable enjoyment of life and property.²²

The Indiana Court of Appeals has held that the failure of an environmental board to make a showing that it took into account the factors required by Indiana Code section 13-7-7-2(b) before adopting a rule will invalidate the rule.²³

When adopting a rule, the following options are authorized by Indiana Code section 4-22-2-29(a): (1) The agency may adopt a rule that is *identical* to the proposed rule published in the *Indiana Register*; (2) the agency may adopt, in one or more actions, a rule or rules that consolidate part or all of two or more proposed rules published in the *Indiana Register*; or (3) the agency may adopt a revised version of a proposed rule published in the *Indiana Register*, and include provisions that did not appear in the published version. However, all of these options are limited by the language of subsection (b) of section 29:

An agency may not adopt a rule that *substantially differs* from the version or version of the proposed rule or rules published in the *Indiana Register*²⁴

After final adoption of a proposed rule by an agency, the rule is to be submitted to the attorney general for approval. The attorney general shall then review the rule for legality.²⁵ The attorney general has forty-

22. *Id.* § 13-7-7-2(b).

23. *Indiana Env'tl Mgmt. Bd. v. Indiana-Kentucky Elec. Corp.*, 181 Ind. App. 570, 393 N.E.2d 213 (1979).

Recognizing that words are little creatures waiting to do their master's bidding in a given context, it is our duty to ascertain the meaning intended by the legislature in requiring that certain factors be "taken into account" before any regulations could be promulgated. Attributing to the phrase "taking into account" its plain, ordinary and usual meaning we must construe the legislative intent to be that the [board] is required to supply meaningful supporting data concerning the relevant factors listed so that the courts and interested parties may be informed of the basis of the [board's] action in taking "into account" the factors listed in the statute. Our use of the word "data" (rather than findings) in describing the relevant factors to be stated is intended to be in the broadest sense possible, including information in whatever form may be available.

Id. at 576, 395 N.E.2d at 219.

24. IND. CODE § 4-22-2-29(b) (1988) (emphasis added).

25. *Id.* §§ 4-22-2-31, -32(a).

five days after receipt of a rule to approve or disapprove the rule.²⁶ The attorney general may disapprove or return the rule if it does not comply with the requisite format requirements.²⁷ Otherwise, the attorney general may disapprove a rule under Indiana Code section 4-22-2-32 only if it:

- (1) has been adopted without statutory authority;
- (2) has been adopted without complying with this chapter;
- (3) *substantially differs* from the proposed rule or rules published [in the *Indiana Register*] on which the adopted rule is based; or
- (4) violates another law.²⁸

If the attorney general takes no action within forty-five days of receipt, the rule is “deemed approved” and the agency may submit it to the governor.²⁹

The factors to be taken into consideration by the attorney general in determining “substantial difference” are set out at Indiana Code section 4-22-2-32(b):

In the review, the attorney general shall determine whether the rule adopted by the agency . . . *substantially differs* from the proposed rule or rules published [in the *Indiana Register*] on which the adopted rule is based. The attorney general shall consider the following:

- (1) The extent to which all persons affected by the adopted rule should have understood from the published rule or rules that their interests would be affected.
- (2) The extent to which the subject matter of the adopted rule or the issues determined in the adopted rule are different from the subject matter or issues that were involved in the published rule or rules.
- (3) The extent to which the effects of the adopted rule differ from the effects that would have occurred if the published rule or rules had been adopted instead.

Once the attorney general approves the rule, or after the rule is considered to be deemed approved by the passage of the forty-five day period, the agency may submit the rule to the governor.³⁰ The governor may approve or disapprove the rule with or without cause.³¹ The governor

26. *Id.* § 4-22-2-32(f).

27. *Id.* § 4-22-2-32(d).

28. *Id.* § 4-22-2-32(c) (emphasis added).

29. *Id.* § 4-22-2-32(f).

30. *Id.* § 4-22-2-33.

31. *Id.* § 4-22-2-34.

has fifteen days to act, but may take thirty days if the governor timely files the requisite statement with the secretary of state. "If the governor neither approves nor disapproves the rule within the allowed period, the rule is deemed approved, and the agency may submit the rule to the secretary of state without the approval of the governor."³² Once the rule has been accepted for filing by the secretary of state, it takes effect thirty days from that date and time, unless a later effective date is established under Indiana Code section 4-22-2-36.³³

Failure to comply with the procedural requirements of Indiana Code section 4-22-2 will render a rulemaking action invalid.³⁴ Failure to complete the process within a one-year period, measured from the time of publication of the proposed rule in the *Indiana Register* to the time the rule is approved or "deemed approved" by the governor, will render a proposal ineffective.³⁵

B. Additions to the Statutory Framework for Rulemaking

Compliance with the above-described statutory procedural framework for environmental rulemaking is but the first step in a far more complicated process in Indiana, a process that has been supplemented by requirements imposed by legislative deadline, by executive order, by agency rule, and by agency practice.

1. *By Legislative Deadline.*—Recent legislative environmental enactments not only have required the adoption of rules, but have established deadlines for board action. For example, Public Law 168-1989, Section 3, provides in relevant part:

- (a) The water pollution control board shall adopt the initial rules required under IC 13-7-26-6, as added by this act [rules establishing ground water quality standards], before July 1, 1990.

Such legislatively imposed deadlines often turn out to provide an unrealistically short time frame for board rulemaking. However, no penalties have been provided by the General Assembly for failure to meet the legislative deadlines.³⁶

32. *Id.*

33. *Id.* §§ 4-22-2-35, -36, -39.

34. *Id.* § 4-22-2-44.

35. *Id.* § 4-22-2-25.

36. Compare the action of Congress, which has imposed self-enforcing statutory timetables upon the Environmental Protection Agency (EPA) for the adoption of regulations via the statutory "hard hammer" and "soft hammer" provisions included in the Hazardous and Solid Waste Amendments of 1984 (HSWA) (Pub. L. No. 98-616 (1984) (codified as amended at 42 U.S.C. § 6924)). An example of the "soft hammer" can be found in HSWA's land disposal restrictions (the "land bans") at § 3004(g)(6)(A), under which hazardous wastes may continue to be land disposed after a specified date

2. *By Executive Order.*—Soon after he took office, Governor Evan Bayh issued an executive order which required that:

Prior to the submission of any rule to the Revisor of Rules of the Code Revision Division of the Legislative Services Agency for publication in the Indiana Register, each State Agency (as defined in I.C. 4-22-2-3(a)) shall submit the proposed rule to the Indiana State Budget Agency, together with a written statement setting forth such State Agency's calculation of the estimated fiscal impact of such rule on State and local government in sufficient detail to permit the director of the Budget Agency to evaluate the accuracy of the calculation and the appropriateness of the methodology used in making such calculation. The director of the Budget Agency must approve such proposed rule prior to submission for publication under I.C. 4-22-2³⁷

even if the EPA has failed to promulgate the requisite regulations, but only with additional statutory restrictions. An example of the "hard hammer" follows at § 3004(g)(6)(C): after the passage of an additional period of time, if the EPA has still failed to promulgate the requisite regulations, "such hazardous waste shall be prohibited from land disposal."

Note also that the EPA may impose rulemaking timetables upon the states.

37. Exec. Order No. 2-89, 12 Ind. Reg. 1466 (1989). Compare the federal Paperwork Reduction Act, 44 U.S.C. § 3501 (1988), and presidential Exec. Order No. 12291, 46 Fed. Reg. 13193 (1981), both of which require submission of EPA regulations to the Office of Management and Budget (OMB) for review. The Paperwork Reduction Act requires the OMB to approve the information collection requirements of a rule. Executive Order No. 12291

requires EPA to assess the effect of Agency actions during the development of regulations. Such an assessment consists of a quantification of the potential costs, economic impacts, and benefits of a rule, as well as a description of any beneficial or adverse effects that cannot be quantified in monetary terms. In addition, Exec. Order No. 12,291 requires that regulatory agencies prepare a regulatory impact analysis (RIA) for major rules.

55 Fed. Reg. 11850 (1990). See *Examining the Reagan Administration's 'Proudest Achievement,'* The Washington Post, Oct. 10-16, 1988, at 33 (Nat'l Weekly ed.):

[Reagan] signed two executive orders that were to dramatically shift the balance of political power from the various agencies responsible for drafting and enforcing federal regulations to the White House.

The first order gave the Office of Management and Budget the power to veto or delay regulations proposed by individual agencies, and required the agencies to submit an economic impact statement for all new regulations showing that the benefits outweighed the costs. The second order set up a task force headed by Vice President Bush to oversee the administration's deregulation efforts.

Another major weapon that appeared in Reagan's deregulation arsenal was the Paperwork Reduction Act ironically, pushed through Congress by the Carter administration, which placed OMB at the center of all regulatory

Thus, the agency may not notify the public of its intent to adopt a rule by publishing notice of public hearing and the full text of the proposed rule in the *Indiana Register*, as provided in Indiana Code section 4-22-2, *unless and until* the director of the State Budget Agency, or the director's delegatee, has approved the proposed rule.

Section 3 of the executive order permits the "director of the Budget Agency [to] delegate his authority to approve or disapprove rules under this Executive Order." Neither the attorney general nor the governor has been granted *statutory* authority to delegate his or her rulemaking responsibilities. Furthermore, unlike the *limited* authority granted by statute to the attorney general to disapprove a rule, under the executive order the budget director needs no justification for a failure to approve a rule. Finally, although under the rulemaking statute inaction by either the attorney general or the governor will lead to the rule being "deemed approved" after the passage of a specified period of time, the executive order sets no time limits on the period during which the budget director may act. Thus, under certain circumstances, the attorney general or governor may *act* to disapprove a rule. The budget director, however, need take no action to disapprove a rule; under the executive order, a rule will be published in the *Indiana Register* only if the budget director takes action to approve it.

3. *By Agency Rule.*—Indiana Code section 4-22-2-43(b) permits an agency to "adopt rules under this chapter to supplement the procedures in this chapter for its own rulemaking actions."³⁸ None of the three environmental boards currently has such rules.

4. *By Agency Practice.*—Under the statutory framework as outlined, rulemaking need not be a lengthy process. An environmental board could publish a proposed rule in the *Indiana Register*, personally hold the mandatory public hearing or hearings at least twenty-one days later, make

decisions. The law charges the budget office with making sure federal agencies do not create unnecessary paperwork.

See also White House Backs Out of Deal Limiting OMB Authority Over EPA Rules, 11 INSIDE E.P.A. WEEKLY REP. 1, 7 (June 15, 1990):

The battle over OMB's authority is being fought in the context of the reauthorization of the Paperwork Reduction Act (PRA), which centralizes paperwork oversight at OMB. Reauthorization bills approved by committees in both the chambers of Congress this year include language aimed at limiting 1983 Executive Orders that require all federal agencies to submit their regulations to OMB for cost-benefit review before they are promulgated. The PRA requires only that OMB ensure that paperwork is not duplicative or overly burdensome to the public. The two Executive Orders in question are 12291, which requires agencies to submit all major rules for OMB clearance; and 12498, which requires annual submissions of proposed regulatory activities.

38. IND. CODE § 4-22-2-43(b) (1988).

decisions at a meeting at the conclusion of the hearings, and then either approve the proposal and send it on to the attorney general, or, if the board elected to make changes that would necessitate another public hearing under Indiana Code sections 4-22-2-29 and 4-22-2-36, send the revised draft back to the *Indiana Register* for republication.

However, such an approach would stand at odds with the reality of the complex nature of major environmental proposals and the intricate mix of interests impacted by these proposals. A number of still-evolving informal processes have been devised in efforts to address this reality. These processes supplement the statutory procedural framework at several points.

Indiana Code section 4-22-2-23 permits a board, before or after public notification of a proposed rulemaking, to solicit comments from all or any segment of the public:

Before or after an agency notifies the public of its intention to adopt a rule under section 24 of this chapter [i.e. by publication in the *Indiana Register*], the agency may solicit comments from all or any segment of the public on the need for a rule, the drafting of a rule, or any other subject related to a rulemaking action. The procedures that the agency may use include the holding of conferences and the inviting of written suggestions, facts, arguments, or views. An agency's failure to consider comments received under this section does not invalidate a rule subsequently adopted.³⁹

In practice, this informal prepublication rule development process has been conducted by the Indiana Department of Environmental Management (IDEM), has been initiated prior to the submission of a rule proposal to an environmental board, and has generally followed one of three models.

a. First model

IDEM prepares the draft rule entirely in-house, then presents it to the appropriate environmental board for consideration.

b. Second model

IDEM, after preparing a working draft of a rule, or with nothing yet on paper, directly solicits input from representatives of groups it believes

39. Note Indiana Code § 4-22-2-17(a), which provides: "IC 5-14-3 [the access to public records law] applies to the text that an agency intends to adopt from the earlier of the date that the agency takes any action under section 24 of this chapter [notice and publication in the *Indiana Register*], otherwise notifies the public of its intent to adopt a rule under any statute, or adopts the rule." See also IND. CODE § 4-22-2-16, regarding the applicability of the Open Door Law (IND. CODE § 5-14-1.5 (1988)).

to be knowledgeable or interested in the subject matter under consideration. IDEM may work one-on-one with various interested persons, or may assemble *ad hoc* working groups. The process, however, is not public, and there is no opportunity for general public involvement, or involvement from interested individuals or groups of which IDEM is unaware, or which IDEM does not choose to involve in the development process. When the process is completed, IDEM presents the proposal to the appropriate environmental board for consideration.

c. Third model

IDEM solicits public input on a specific issue, prior to, or as part of the process of, rule development. This solicitation is accomplished by public notification in various newspapers and in the *Indiana Register's* section on "Other Notices,"⁴⁰ and somewhat parallels the advance notice of rulemaking procedure at the federal level. Informal public meetings are held and written public comments also are solicited. Again, when the rule development process is completed, IDEM presents the proposal to the appropriate environmental board for consideration.

The environmental board itself may have little or no knowledge of the rule development taking place under models one and two until the resultant proposal is scheduled for board consideration, either "for discussion only" or "for preliminary adoption."⁴¹

Representatives of various interest groups may appear at the board meeting at which the proposal is considered, either to encourage adoption of the proposal, or to urge modifications to the proposed language prior

40. See, e.g., 13 Ind. Reg. 1346 (1990), in which IDEM gives notice of public meetings it has scheduled on the regulation of air toxics,

IDEM intends to propose rules to the Air Pollution Control Board that will establish a regulatory program to limit exposure to Indiana citizens from certain hazardous air pollutants. The purpose of this notice is to provide information to the public on the necessity and contents of such a regulatory proposal and to announce that IDEM is seeking public input prior to proposing rules to the Board. Public meetings will be held throughout the State to discuss IDEM's proposals in the area of air toxics.

Id. See also 13 Ind. Reg. 968 (1990) (regarding "new procedures to develop NPDES permit limitations based on the revisions to 327 IAC 2-1"); 13 Ind. Reg. 969 (Feb. 1, 1990) (regarding "a new rule by which owners and operators of underground petroleum storage tanks may be entitled to reimbursement from the underground storage tank Excess Liability Fund for some costs of corrective action that are incurred as a result of a release from an underground storage tank").

41. The term "preliminary adoption" is commonly applied to the process of board approval of the text of a draft rule as the initial step in fulfilling the statutory requirement under Indiana Code section 4-22-2-24 (notifying the public of "its intention to adopt a rule" by publication of notice of public hearings and the full text of the proposed rule in the *Indiana Register*).

to preliminary adoption, or to urge the board to direct the IDEM staff to do further work on the proposal before preliminary adoption. Unfortunately, if the proposal was developed under models one or two, those who have not been included in the informal rule development process may not be present because they are unaware that consideration of a proposal affecting their interests is taking place. Or, if they are present, they may not have had the opportunity to prepare effective testimony for the board to consider. Notice of a board meeting need be posted only "forty-eight (48) hours before the meeting."⁴² The board agenda, which may be the only notice that preliminary adoption of a proposed rule is being considered, need be posted only "at the entrance to the location of the meeting prior to the meeting."⁴³ Finally, in some cases, copies of the text of the proposal may not be generally accessible during the course of the board deliberations to those who were not a part of the initial rule development process.

The board may vote to preliminarily adopt the rule and to schedule it for publication and public hearings. Or it may direct staff to informally meet with various interest groups to try to reach an accommodation between the differing positions that have been communicated to it. Or it may direct that a more formal working group representing the various interests be formed to meet and come up with recommended language. Other variations may occur because none of this pre-publication process is governed by statute. Even after initial board involvement, IDEM has not considered pre-publication rule development to be covered by the Open Meetings Law.⁴⁴

Following preliminary adoption of the text of a proposed rule by an environmental board, notice and publication, and the public hearings, the hearing officer will prepare written findings and recommendations for the full board's consideration.⁴⁵ As a result of the oral and written comments received on the proposed rule, the hearing officer may recommend changes to the language of the proposal prior to final adoption by the board.

At the board meeting considering final adoption of a proposed rule, after the report of the hearing officer, it is the general practice of the environmental boards to again hear public comment on the proposal. Based upon the report of the hearing officer and the testimony received,⁴⁶ the

42. IND. CODE § 5-14-1.5-5 (1988).

43. *Id.* § 5-14-1.5-4.

44. *Id.* § 5-14-1.5.

45. *See supra* note 18.

46. Indiana Code § 4-22-2-27 provides in relevant part: "The individual or group of individuals who will finally adopt the rule under section 29 of this chapter shall fully consider comments received at the public hearing required by section 26 of this chapter *and may consider any other information* before adopting the rule" (emphasis added).

board has the option of voting to adopt the language of the proposed rule as published in the *Indiana Register*, to adopt the published language with specific modifications, or to send the proposal back to IDEM for further work, or to reject or table the proposal.

III. PUBLIC INPUT V. SUBSTANTIAL DIFFERENCE: A CONUNDRUM

Many proposed environmental rules presented to a board for final adoption are massive documents of great complexity. They have been subject to an extensive pre-publication rule development process, often extending back over many months or even years. The text published in the *Indiana Register* has been the subject of two or more public hearings. In addition to the oral testimony presented at those hearings, hundreds of pages of written comments not only discussing the public policy ramifications of the proposed rule — its probable impacts on industry, on the state's economy, and on public health and the environment — but also analyzing the technical aspects of the rule in great detail and pointing out errors, misconceptions, possible improvements, and unresolved problems, have been submitted to the hearing officer.

All of this material will be carefully studied by IDEM's technical staff, and written responses will be prepared to the comments, along with suggested findings and recommendations. These recommendations often will include revisions to the language of the proposed rule, made as the result of problems pointed out by the public comments. The hearing officer will include this material in his or her report to the board, and will note agreement or disagreement with the various suggested findings and recommendations.

At the board meeting when the proposed rule is eligible for final adoption, public testimony again will be permitted, although not required by statute.⁴⁷ Many representatives of affected parties or interest groups believe that the best way to influence the board's decision is to speak to the board members directly, rather than to rely on the hearing officer's report to convey their interest or concerns.

When the time comes for final adoption of a rule, if the board is convinced that changes should be made to the language of the proposal as published in the *Indiana Register*, the board may face an intricate and difficult problem — a conundrum. Among the choices the board may consider are the following:

- (1) Finally adopt the rule without the changes.
- (2) Adopt the rule with the changes, on the basis that the rule as adopted does not *substantially differ* from the proposed rule

47. See *supra* note 44 and accompanying text.

published in the *Indiana Register*.

(3) Make the changes to the rule, readopt it, and submit it again for public notice and hearings.

(4) Send the rule back to IDEM with direction to work out the problems and then to resubmit the revised version to the board for readoption, to be followed by public notice and hearings.

The board's decision turns on the question of whether the changes constitute a "substantial difference." As noted earlier, Indiana Code section 4-22-2-32 sets out the factors the attorney general "shall consider" in deciding whether a rule "substantially differs from the proposed rule or rules published [in the *Indiana Register*] on which the adopted rule is based."⁴⁸ First, the attorney general is to consider the extent to which persons affected by the adopted rule should have understood from the version published in the *Indiana Register* that their interests would be affected; second, "the extent to which the subject matter of the adopted rule or the issues determined in the adopted rule" differ(s) from the version published in the *Indiana Register*; and third, the extent to which the "effects of the adopted rule differ from the effects that would have occurred if" the version published in the *Indiana Register* had been adopted instead.⁴⁹

The first and second factors clearly are due process standards. The rationale of the third factor can best be understood in light of the fact that the language of Indiana Code section 4-22-2-32(b)'s three factors duplicates that of section 3-107 of the Uniform Law Commissioners' Model State Administrative Procedure Act (1981) [1981 MSAPA].⁵⁰ Section 3-107 of the 1981 MSAPA is headed "Variance between Adopted Rule and Published Notice of Proposed Rule Adoption."

The "evils" to be prevented by the "substantial difference" language have been described by the chief drafter of the 1981 MSAPA provision as follows:

Public participation in rule making is intended to assure agency accountability. It would be meaningless, however, if an agency were allowed to adopt a rule that had no substantial relationship to the rule originally proposed in the required published notice. Under those circumstances any agency could circumvent opposition to a proposed rule by intentionally omitting from its text, at the time it was initially published as a proposal, those portions that are likely to be controversial. Then, at the time of its adoption, the agency could rewrite the rule to incorporate the controversial provisions that would have provoked a public outcry had they

48. IND. CODE § 4-22-2-32 (1988).

49. *Id.* § 4-22-2-32(b).

50. See BONFIELD, STATE ADMINISTRATIVE RULE MAKING app. I (1986).

been known at the time the rule was originally proposed. To avoid evasive tactics of this kind, an APA should establish some limits on the variance allowed between the text of a published proposed rule and the text of the rule that is actually adopted at the end of the rule-making proceeding.⁵¹

Certainly there is a large distance between the sort of evasive agency tactics described by Bonfield and corrections and improvements made to the text of a proposal as a result of public input. Bonfield himself notes:

Agencies should not be required to publish entirely new notices of proposed rule adoption, and to allow additional public input, every time the input received as a result of a published notice of proposed rule adoption convinces them to modify a proposed rule in any fashion. If agencies were entirely prohibited from altering the text of a proposed rule at the time it was finally adopted without, in effect, starting a new rule-making proceeding, two undesirable consequences would occur. First, agencies would be discouraged from making desirable changes in their rule proposals on the basis of public input which would defeat one of the major purposes of the required rule-making procedures. Second, agencies proposing controversial rules would have to engage in rule-making proceedings that would continue endlessly, as new and valid criticisms of successive forms of the proposed rule caused the commencement of entirely new rounds of notice and comment.⁵²

These have been, however, precisely the effects that section 3-107 of the Uniform Law Commissioners' Model State Administrative Procedure Act have imposed on the environmental rulemaking process in Indiana. The boards have been reluctant to preliminarily adopt a rule and put it out for public comment until they believe that the language has been finalized. Once public comment has been received, the boards have been reluctant to make changes in response to such comments because such changes may constitute a "substantial difference."

IV. THE "LOGICAL OUTGROWTH" RULE

The federal Administrative Procedures Act establishes the procedures for informal "notice and comment" rulemaking at the federal level.⁵³

51. BONFIELD, *supra* note 50, at 232.

52. *Id.* at 233.

53. 5 U.S.C. § 553 (1988). Rules "required by statute to be made on the record after opportunity for an agency hearing" are governed by 5 U.S.C. §§ 556, 557. *Id.* § 553(c).

Section 553(b) provides that "general notice of proposed rulemaking shall be published in the Federal Register." The notice shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Section 553(c) states that after notice,

the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of the basis and purpose.

In response to arguments that changes in a proposed rule require a new opportunity to comment, the federal courts have said that "an agency may make changes in its proposed rule on the basis of comments without triggering a new round of comments, at least where the changes are a 'logical outgrowth' of the proposal and previous comments."⁵⁴ The court in *Stoughton v. EPA* stated the rationale as follows:

The statutory requirement of notice and the opportunity for comment on a proposed rule "does not automatically generate a new opportunity for comment" every time the Agency reacts to the comments. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C.Cir. 1973).

As we have long recognized, "[a] contrary result would lead to the absurdity that the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." *Id.* at 632, n.51. If it were not possible for an agency to reexamine and even modify the proposed rule, there would be little point in the comment procedures. "The whole rationale of notice and comment rests on the expectation that the final rules will be somewhat different and improved from the rules originally proposed by the agency." *Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Comm'n*, 650 F.2d 1235, 1249 (D.C.Cir. 1980), *cert.denied*, 451 U.S. 984 (1981).⁵⁵

V. CONCLUSIONS AND RECOMMENDATIONS

As stated at the beginning of this Article, the environmental boards frequently may be reluctant to publish the text of a proposed rule and

54. *Stoughton v. EPA*, 858 F.2d 747, 751 (D.C. Cir. 1988) (citing *NRDC v. Thomas*, 838 F.2d 1224, 1242 (D.C. Cir. 1988)); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). See generally Brennan, *EPA Rulemaking and Adequate Notice*, 5 NAT'L RESOURCES & ENV'T 5 (1990).

55. *Stoughton*, 858 F.2d at 751-52.

to schedule it for public hearing and comment until the language of the rule has been finalized because the boards are hesitant to make changes to the proposed rule after such publication. The reason is that such change may be considered a substantial difference which necessitates another round of rulemaking. The result is that the pre-publication rule development stage takes on major significance; it may become the stage in the rulemaking process in which public input is the most effective. However, the pre-publication rule development process is not always open to the public, and "public" input is often selective public input because the statutory safeguards of Indiana Code section 4-22-2-24 do not apply. The ironical result is that at the point at which such safeguards do apply, the "substantial difference" provisions of the rulemaking statute operate to make the boards reluctant to take public input into account except under the most egregious circumstances.⁵⁶

Two differing approaches might be taken in an effort to resolve this quandary. The first approach would involve legislative elimination of the substantial difference language in the statute, leaving it to the Indiana courts, when the proper case is presented to them, to devise a "logical outgrowth" test or some other standard.⁵⁷ The second approach would be for the environmental boards to acknowledge the reality that the substantial difference requirement has seriously weakened the effectiveness of the public hearing process, and for the boards to require that all future preliminary (pre-publication) rule development be made accessible to the general public. This could be accomplished by IDEM consistently following the third model, which, as described previously, involves the public in the rule development process at an early stage through notification in the *Indiana Register's* section on "Other Notices." It is acknowledged, however, that this solution would be at best only a "fix" to circumvent the difficulties

56. This result conflicts directly with the purpose of the informal notice and comment rulemaking process, well stated in *Dow v. Consumer Product Safety Commission*, 459 F. Supp. 378, 390 (W.D. La. 1978),

Informal rule-making has been heralded as one of the most successful innovations of administrative law. It is a truly democratic procedure and provides the agency with channels of information. It is fair to all parties and produces a record by which the courts and Congress can efficiently supervise agency action. Solicitation of comments is the basis of informal rule-making, because it is the means by which the public participates in the rule-making process. It is also an efficient channel through which experts in the field and those affected by the proposed rules can provide information which may have been overlooked by the agency, can point out the abstruse effects of the proposed rules, and can suggest alternatives.

Id. at 390.

57. A related option, of course, would be to replace the statutory substantial change test with a logical outgrowth test.

caused by the boards' well-founded reluctance to run afoul of the substantial difference prohibition of the rulemaking statute.

Recent Developments in Indiana State and Federal Evidence Law

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I. INTRODUCTION

This Article addresses recent noteworthy developments in both state and federal evidence law applicable to Indiana practitioners including the use of partial settlement agreements, expert testimony, the physician-patient privilege, remedial measures, the amendments to Federal Rule of Evidence 609(a), the "Frye Test," and attorney-client privilege. The first section of the Article discusses significant state court decisions. The second section highlights recent federal law developments.

II. INDIANA EVIDENTIARY ISSUES

A. Admissibility of Partial Settlements

In *Manns v. Indiana Department of Highways*,¹ the Indiana Supreme Court clarified evidentiary uses of partial settlement agreements at trial.² The controversy in *Manns* was the use at trial of a partial settlement agreement between the plaintiff and another party.

1. Background.—Generally, offers to compromise are inadmissible in Indiana.³ Likewise, evidence of offers made by one party to non-parties have been inadmissible to demonstrate a weakness in the offering

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The views expressed are solely those of the authors. The authors wish to express their appreciation to Carolyn J. Bogard for her assistance in the preparation of the Article.

1. 541 N.E.2d 929 (Ind. 1989).

2. Documents evidencing partial settlement include a release, covenant not to sue, covenant not to execute, guaranty agreements ("Mary Carter Agreements"), and loan receipts. The release probably would not raise an issue for trial in multi-party litigation because generally a release of one tortfeasor is a release of all. See *Griffin v. Carmel Bank & Trust*, 510 N.E.2d 178 (Ind. Ct. App. 1987).

3. 12 R. MILLER, INDIANA PRACTICE § 408.101, at 317 (1984) [hereinafter INDIANA PRACTICE]. The rule seeks to encourage settlements without prejudicing a party whose good faith attempts to settle have failed.

party's case.⁴ In contrast, prior to *Manns*, covenants were admissible for the purpose of allowing the jury to determine whether the consideration given for the covenant was in full or partial satisfaction of the plaintiff's claim.⁵

2. *The Manns Decision*.—Manns sued Hintz and the Indiana Department of Highways for injuries received when Manns and Hintz collided after Hintz stopped at a stop sign but failed to yield the right of way to Manns on the preferential highway.⁶

Prior to trial, Hintz paid \$125,000 to Manns in exchange for a covenant not to sue and dismissal.⁷ At trial, Manns called Hintz as a witness.⁸ On cross-examination the State was permitted, over Manns's objection, to question Hintz about the settlement agreement. On Manns's redirect of Hintz, however, the trial court excluded the covenant not to sue.⁹

The Indiana Court of Appeals affirmed the trial court on the issue of the admissibility of the covenant.¹⁰ In doing so, it interpreted the supreme court's opinion in *State v. Ingram*¹¹ as holding that settlement agreements were admissible for jury consideration.¹²

The supreme court in *Manns* disagreed and stated, "Our holding in *Ingram* did not rule that the amount or existence of a settlement agreement was necessarily admissible."¹³ Holding that such evidence is generally inadmissible, the supreme court departed from a line of cases allowing the jury to consider settlement agreements to determine whether the consideration given for a covenant is full or partial satisfaction of the claim.¹⁴ The *Manns* court further held that even when a defendant asserts full or partial satisfaction as an affirmative defense, and the existence and amount of the settlement is not disputed by the plaintiff, the settlement agreement should not be presented to the jury; rather,

4. 12 INDIANA PRACTICE, *supra* note 3, § 408.103 at 322.

5. *Bedwell v. DeBolt*, 221 Ind. 600, 50 N.E.2d 875 (1943); *see also Sanders v. Cole Mun. Fin.*, 489 N.E.2d 117 (Ind. Ct. App. 1986).

6. *Manns*, 541 N.E.2d at 931.

7. *Id.*

8. *Id.* The court does not describe whether Hintz' testimony was favorable to Manns.

9. *Id.* Indiana's Third District Court of Appeals observed that at trial Manns offered the entire agreement containing "references to insurance and representations beneficial to the plaintiff concerning the asserted liability of the state and the extent of plaintiff's damages." *Manns v. Indiana Department of Highways*, 524 N.E.2d 334, 336 (Ind. Ct. App. 1988).

10. *Manns*, 524 N.E.2d 334.

11. 427 N.E.2d 444 (Ind. 1981).

12. *Manns*, 524 N.E.2d at 336.

13. 541 N.E.2d at 932.

14. *Id.* at 933. *See cases cited supra* note 5.

the trial court should make a “*pro tanto* adjustment” or set-off of the verdict according to the settlement.¹⁵

In so holding, the supreme court distinguished covenants not to sue or execute from loan receipt agreements,¹⁶ which are agreements between a co-defendant and a plaintiff wherein the co-defendant agrees to pay money to satisfy the plaintiff’s claim against that defendant in exchange for a release and a promise by the plaintiff to reimburse the co-defendant if he obtains a judgment in a certain amount from the other defendant. Because pecuniary bias could be present on the part of the defendant-witness who executes the loan receipt agreement and testifies in favor of the plaintiff,¹⁷ loan receipt agreements continue to be admissible on the issue of the lender’s credibility.¹⁸

Distinguishing loan receipt agreements from settlement agreements, the *Manns* court disallowed use of settlement agreements (as opposed to loan receipt agreements) to impeach a witness, explaining:

We recognize that situations may occur in which a defendant may seek to impeach a witness by arguing that a prior settlement facilitated his lack of involvement in the action. Under our decision today, such ground is insufficient to justify admission of the settlement with its attendant potential for confusion and unfair prejudice.¹⁹

This holding differs from current law being applied by federal courts. Federal Rule of Evidence 408 provides that even settlement agreements may be admissible when the evidence is offered to prove bias or prejudice of a witness.²⁰

15. 541 N.E.2d at 934.

16. *Id.* at 933.

17. *State v. Thompson*, 179 Ind. App. 227, 245, 385 N.E.2d 198, 210 (1979), *transfer denied*.

18. *Manns*, 541 N.E.2d at 934. Loan receipt agreements have long been held admissible in Indiana. *See also* 12 INDIANA PRACTICE, *supra* note 3, § 611.209, at 601. For recent developments regarding loan receipt agreements in Indiana, see Maley, *Developments in Federal Civil Practice Affecting Indiana Practitioners: Survey of Supreme Court, Seventh Circuit and Indiana District Court Opinions*, 22 IND. L. REV. 103, 131-38 (1989) and Strohmeyer, *Loan Receipts Revisited Recognizing Substance Over Form*, 21 IND. L. REV. 439 (1988).

19. *Manns*, 541 N.E.2d at 934 (citation omitted). The *Manns* court indicated it was taking a different approach than that found in *Gray v. Davis Timber & Veneer Corp.*, 434 N.E.2d 146, 148 (Ind. Ct. App. 1982). *Gray*, however, also involved the use of a loan receipt agreement to impeach a former agent of the company-defendant entering into the agreement, who, arguably, may not have retained any pecuniary bias.

20. The rule provides that the evidence of a compromise may also be admissible when offered to rebut a contention of undue delay or to prove efforts to obstruct criminal

The *Manns* court also determined that when the fact and amount of a settlement agreement are made known to a jury, the opposing party is permitted to introduce evidence explaining the intent and circumstances of the agreement, including the documents evidencing settlement. Because the evidence could further confuse and prejudice the jury, however, the trial court may, in its discretion, "redact such an exhibit by excising inflammatory, evocative language irrelevant to a fair explanation of the motivating intent and circumstances of the settlement agreement."²¹

The court did not discuss the line of cases requiring exclusion of the amount of the settlement rather than the fact of settlement.²² By allowing the trial court to excise prejudicial information in a settlement agreement, however, it appears *Manns* follows precedent on this issue.

Finally, *Manns* confirms that a joint tortfeasor is not a "collateral source."²³ The appellate court cited the collateral source rule codified

prosecution or delay. Federal Evidence Rule 408 provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. *Evidence of conduct or statements made in compromise negotiations is likewise not admissible.* This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408 (emphasis added). The federal rule also differs from Indiana law to the extent that in Indiana, statements of fact independent of the negotiation but made during negotiations are admissible. See 12 INDIANA PRACTICE, *supra* note 3, § 408.102, at 320. The trend, however, is to extend the "exclusionary rule" to all statements made during negotiations. See E.W. CLEARY, MCCORMICK ON EVIDENCE § 274, at 812 (3d ed. 1984) [hereinafter MCCORMICK] (stated reason that rule of admissibility of independent facts gleaned in negotiations is difficult to apply). Indeed, Indiana cases are confusing as to application of the rule. See *Tyree v. State*, 518 N.E.2d 814, 816 (Ind. Ct. App. 1988), in which the factual basis established for a guilty plea was ruled inadmissible due to inability to separate from the plea.

21. *Manns*, 541 N.E.2d at 935.

22. See *Gray*, 434 N.E.2d at 148-49; *Ohio Valley Gas, Inc. v. Blackburn*, 445 N.E.2d 1378, 1383 (Ind. Ct. App. 1983). *Gray* clarified the previous holdings in *Ingram* and *Erskine v. Duke's GMC, Inc.*, 413 N.E.2d 305 (Ind. Ct. App. 1980), in which both courts held entire settlement agreements were admissible to rebut defendant's submission of evidence of the fact a settlement occurred. The *Gray* court stated:

We ruled that it was error not to allow the plaintiff to introduce the agreement and held that either the entire applicable portion of the agreement is admissible or none of it is. Our ruling in *Erskine* does not mean that an irrelevant or highly prejudicial portion could not be properly deleted prior to its introduction.

Gray, 434 N.E.2d at 149.

23. 524 N.E.2d at 336.

at Indiana Code section 34-4-36-2²⁴ as alternative support for admitting settlements into evidence.²⁵ The supreme court disagreed and distinguished settlement agreements from the collateral sources addressed in the statute.²⁶ Since partial settlements offset a verdict, they will not provide a double recovery like the collateral sources addressed in the statute.²⁷ Therefore, settlements with other tortfeasors are not admissible pursuant to the "collateral source rule."

3. *Conclusion.*—Attorneys should be aware that most partial settlement agreements are inadmissible, and should consider filing a motion in limine to assure exclusion of the evidence. If for some reason the fact of a partial settlement agreement is made known to the jury, attorneys objecting to the admissibility should consider explaining the circumstances of the agreement. Counsel opposing such an explanation should request the court to excise the amount of the settlement and any prejudicial and inflammatory language.

B. Expert Testimony

During the survey period, expert testimony also received attention by Indiana courts. *Hegerfield v. Hegerfield*²⁸ discussed the necessity for the expert to explain underlying formulas and calculations while *In re Paternity of K.G.*²⁹ clarified the expert's use of information received from third parties when rendering an opinion.

24. IND. CODE § 34-4-36-2 (1988) provides:

Sec. 2. In a personal injury or wrongful death action the court shall allow the admission into evidence of:

(1) proof of collateral source payments, other than:

(A) payments of life insurance or other death benefits;

(B) insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly; or

(C) payments made by the state or the United States, or any agency, instrumentality, or subdivision thereof, that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought;

(2) proof of the amount of money that the plaintiff is required to repay, including worker's compensation benefits, as a result of the collateral benefits received; and

(3) proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family.

Id.

25. *Manns*, 524 N.E.2d at 336.

26. *Manns*, 541 N.E.2d at 934.

27. *Id.*

28. 555 N.E.2d 853 (Ind. Ct. App. 1990).

29. 536 N.E.2d 1033 (Ind. Ct. App.), *aff'd and remanded*, 545 N.E.2d 564 (Ind. 1989).

1. *The Hegerfield Decision*.—In *Hegerfield*, the Indiana Third District Court of Appeals held that the trial court abused its discretion by allowing a certified public accountant, Wunrow, to testify as an expert about the value of Mr. Hegerfield's pension benefit in a proceeding to divide the Hegerfields' property.

It is well established that the competency of a witness to testify as an expert witness is a determination for the trial court and is within the court's discretion.³⁰ A witness may qualify as an expert based upon his or her training, education, and experience.³¹ The expert is not required to "demonstrate his knowledge of specific scientific principles, formulas or calculations in order to be qualified to state his opinion."³² Generally, the expert's specific knowledge goes to the weight, not the admissibility, of the testimony.³³

Prior to the *Hegerfield* decision, in *Martin v. Roberts*,³⁴ the supreme court reversed a Second District Court of Appeals decision which held that the trial court abused its discretion in permitting a police officer/investigator to give his opinion concerning the speed of a vehicle. The appellate court reversed the trial court because the expert had not presented his opinion with any formula, calculation, or principle.³⁵ The supreme court, however, held that the officer's specific knowledge of formulas, calculations, and principles was a subject for cross-examination:

There are doubtless many formulas and principles which experts use in this field or any other to arrive at their ultimate opinions. The determination of which factors, formulas or calculations are necessary, either singly or in conjunction with each other, to form an expert opinion is within the knowledge and judgment of the expert and, again, is a subject which can be approached and examined in the cross-examination or by bringing forward other expert witnesses.³⁶

Several Indiana cases have followed the general rule that the failure of the expert witness to state or explain a calculation or formula affected the weight, not the admissibility, of the expert's opinion.³⁷

30. *Hegerfield*, 555 N.E.2d at 855 (citing *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349, 365 (Ind. 1982)).

31. *Martin v. Roberts*, 464 N.E.2d 896, 899 (Ind. 1984).

32. *Id.*

33. *Id.* See also *Travelers*, 442 N.E.2d 349.

34. 464 N.E.2d 896 (Ind. 1984).

35. *Martin v. Roberts*, 452 N.E.2d 182, 187 (Ind. Ct. App. 1983).

36. *Martin*, 464 N.E.2d at 900-01.

37. *Id.* See also *Boarman v. State*, 509 N.E.2d 177 (Ind. 1987); *Estate of Hunt v. Board of Comm'rs of Henry County*, 526 N.E.2d 1230, 1235 (Ind. Ct. App. 1988).

The *Hegerfield* court appears to have applied a stricter standard to Wunrow's testimony. Reviewing the testimony to determine whether a proper foundation was laid, the court found that the requirements had not been met.³⁸ Those foundational requirements include first, that the expert's testimony is not within the common knowledge of the jury; second, that the witness is qualified to render an opinion; and third, that the opinion would aid the jurors in understanding the facts.³⁹

The court determined that although Wunrow was not required to possess experience in calculating mortality tables and discount rates, he was required to be familiar with mortality, discount rates and life expectancy. He was also required to "demonstrate that he knows first what the data represent and second, why or how that data applies to this particular case."⁴⁰

First, the court concluded from the record that Wunrow's experience related to tax consequences for small businesses, and consequently stated, "[T]his was the first clue that Wunrow was not competent to testify as an expert on pension valuation."⁴¹ Second, the court decided Wunrow needed to demonstrate his "knowledge of the process of ascertaining the present value of pension benefits."⁴² The court was influenced by Wunrow's inability to explain what the figures he obtained from a Pension Benefit Guaranty Corporation table represented.⁴³ Third, the court suspected Wunrow was merely parroting figures calculated by another firm.⁴⁴ Relying on *Terre Haute First National Bank v. Stewart*, the court concluded Wunrow was simply reading the other firm's calculations into evidence.⁴⁵

In short, the court concluded Wunrow was not qualified to testify as an expert regarding pension valuation.⁴⁶ Thus, the initial foundational requirements had not been met.

The Fourth District Court of Appeals in *Estate of Hunt* also noted that the standard of review on the issue of abuse of discretion is stringent; a reversal should occur only if the trial court has "drawn an erroneous conclusion clearly against the logic and effect of the facts and circumstances or the reasonable and actual deductions to be made from such evidence." *Id.* at 1235 (citation omitted).

38. *Hegerfield*, 555 N.E.2d at 856.

39. See 13 INDIANA PRACTICE, *supra* note 3, § 705.101, at 73; *Summers v. State*, 495 N.E.2d 799, 802 (Ind. Ct. App. 1986), *transfer denied*.

40. *Hegerfield*, 555 N.E.2d at 856.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* (citing 455 N.E.2d 362 (Ind. Ct. App. 1983)).

46. "[N]o precise knowledge or quantum of knowledge is required, if the witness shows an acquaintance with the subject such as to qualify him to give an opinion"

At first glance, *Hegerfield* appears to tighten the requirements concerning an expert's knowledge of formulas and calculations forming the basis of the expert's opinion. The court was careful, however, to avoid this appearance by finding the expert did not possess the qualifications necessary to aid the trier of fact concerning pension valuation. It appears, however, that the court did not determine Wunrow's lack of qualifications until reviewing cross-examination testimony.⁴⁷ The court explained that the proponent needed to show Wunrow's knowledge of the process of ascertaining the present value of pension benefits, but failed to do so.⁴⁸ It is not clear from the opinion whether Wunrow's inabilities were apparent during direct examination when the proponent attempted to lay the foundation for Wunrow's testimony.

Hegerfield warns counsel offering expert testimony that more than training, education, and experience may be necessary to qualify an expert witness who relies on another individual's calculations and tables in forming an opinion. Again, the attorney may argue that such explanation of calculations and formulas should be considered only when determining the weight to be given the testimony as in *Martin*, and not when determining whether the witness is qualified.

2. *In re Paternity of K.G.*—*In re Paternity of K.G.*⁴⁹ clarified the expert's use of third-party reports when rendering his opinion.

Expert opinion based in part upon a report of a third person is generally admissible in Indiana, even though the report may not be in evidence or is inadmissible.⁵⁰ The hearsay relied upon, however, must be the type customarily relied upon by experts in the same field.⁵¹

The foundation for expert testimony that relies in part on hearsay reports was set forth in *Duncan v. George Moser Leather Co.*⁵² and requires that

Spaulding v. State, 533 N.E.2d 597, 601 (Ind. Ct. App. 1989) (citation omitted). The standard when reviewing a determination of the expert witness's qualifications is also abuse of discretion. *Summers*, 495 N.E.2d at 802. See also 13 INDIANA PRACTICE, *supra* note 3, § 702.102, at 31-32.

47. "Wunrow's/Law Data's calculations were impossible to probe on cross-examination because Wunrow did not possess sufficient skill or knowledge" *Hegerfield*, 555 N.E.2d at 856.

48. "As the questioning progressed, it became clear that Wunrow . . . did not understand . . . what the figures . . . represented." *Id.*

49. 536 N.E.2d 1033 (Ind. Ct. App. 1989), *aff'd and remanded*, 545 N.E.2d 564 (Ind. 1989).

50. 13 INDIANA PRACTICE, *supra* note 3, § 703.104, at 54. Until fairly recently, Indiana followed the traditional rule that expert testimony was admitted only if the opinion was based on facts personally known to the witness or upon facts contained in a hypothetical question. *Id.* at 53-54.

51. *Clouse v. Fielder*, 431 N.E.2d 148, 155 (Ind. Ct. App. 1982) (citing *Gooch v. Hiatt*, 166 Ind. App. 521, 337 N.E.2d 585 (1975)).

52. 408 N.E.2d 1332 (Ind. Ct. App. 1980).

1. the expert must have sufficient expertise to evaluate the reliability and accuracy of the report;
2. the report must be of a type normally found reliable; and
3. the report must be of a type customarily relied upon by the expert in the practice of his profession or expertise⁵³.

The expert witness must also have expertise in evaluating the content of the information relied upon to assure the right to cross-examination and to assure that the expert is not merely repeating another expert's opinion.⁵⁴

In *In re Paternity of K.G.*, Dr. Chen supervised blood testing for the American Red Cross. After having been qualified as an expert witness, Chen explained procedures followed when blood was tested under his supervision. Chen testified as to testing done in the paternity case and gave his opinion as to paternity. Also, over objection, he was permitted to testify that someone under his supervision drew blood from the pertinent parties, the rules for chain of custody were followed, and the blood samples were tested.⁵⁵

In reaching its decision, the Indiana Court of Appeals first distinguished the factual testimony from the opinion testimony.⁵⁶ Because Chen had no first-hand knowledge of the testing procedures actually conducted in that case, the court determined that the trial court should not have permitted Chen's testimony concerning the *facts of testing*.⁵⁷

Second, the court determined that Chen's opinion testimony should not have been admitted because his opinion was unfounded. The court explained that the testimony was based neither upon first-hand knowledge nor upon a report "of a type normally found to be reliable and of a type customarily relied upon by him in the practice of his profession."⁵⁸ Further, the court noted that "[t]he State did not introduce a report

53. *Id.* at 1343 (citations omitted). Federal Rule of Evidence 703 provides: The facts or data in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.

Miller notes that the Federal rule does not require the expert to be able to evaluate the reliability and accuracy of the report. 13 INDIANA PRACTICE, *supra* note 3, § 703.111, at 67.

54. *Duncan*, 408 N.E.2d at 1343.

55. *In re Paternity of K.G.*, 536 N.E.2d at 1034.

56. *Id.* at 1035.

57. *Id.* at 1035-1036.

58. *Id.* at 1036 (citing *Duncan*, 408 N.E.2d 1332).

prepared under Chen's supervision or by anyone else."⁵⁹ More importantly, before Chen rendered his opinion as to paternity, there was no showing that Chen had relied upon *any* report.⁶⁰

Thus, *In re Paternity of K.G.* establishes that an expert opinion can be based upon: (1) firsthand knowledge, (2) facts otherwise in the record or facts that can be assumed from the evidence and stated by a hypothetical question, and (3) in part upon a report not in evidence or inadmissible if the expert can evaluate the reliability of the report.⁶¹ Such expert opinion is of a type normally found to be reliable, and it is of a type customarily relied upon in the expert's profession.⁶²

C. *The Physician-Patient Privilege*

Two cases decided in this survey period examining the physician-patient privilege are significant to understanding the scope of the privilege. The first case, *Daymude v. State*,⁶³ addressed the scope of one of the "CHINS" reporting statutes⁶⁴ and is a case of first impression in Indiana. The second case, *In re C.P.*⁶⁵ addressed an issue conceded in *Daymude*: whether communications made to the agent of the physician are included in the privilege.

1. *Background.*—The physician-patient privilege is a legislative creation and did not exist at common law.⁶⁶ The purpose of this evidentiary privilege is to encourage honest communications by patients to physicians to ensure proper treatment. As the supreme court discussed in *Collins v. Bair*:⁶⁷

The privilege has been justified on the basis that its recognition encourages free communications and frank disclosure between

59. *Id.* Admissibility of the relied upon report is not a requirement for the expert opinion testimony.

60. *Id.*

61. *Id.* at 1035.

62. *Id.*

63. 540 N.E.2d 1263 (Ind. Ct. App. 1989).

64. IND. CODE § 31-6-11-8 (1988).

65. 563 N.E.2d 1275 (Ind. 1990).

66. *Towles v. McCurdy*, 163 Ind. 12, 71 N.E. 129 (1904). 12 INDIANA PRACTICE, *supra* note 3, cites MCCORMICK ON EVIDENCE § 98 (2d ed. 1972) for the proposition that the privilege was unknown at common law. 12 INDIANA PRACTICE also cites Indiana cases that Miller contends mistakenly refer to a common law rule existing prior to the statute. "In light of the courts' inability to decide firmly whether the privilege should be strictly construed or liberally applied, that inconsistent holdings have resulted under the statute should not be surprising." 12 INDIANA PRACTICE, *supra* note 3, § 504.103, at 394-395.

67. 256 Ind. 230, 268 N.E.2d 95 (1971). *See also* 12 INDIANA PRACTICE, *supra* note 3, § 504.102, at 392 n.1.

patient and physician which, in turn, provide assistance in proper diagnosis and appropriate treatment. To deny the privilege, it was thought, would destroy the confidential nature of the physician-patient relationship and possibly cause one suffering from a particular ailment to withhold pertinent information of an embarrassing or otherwise confidential nature for fear of being publicly exposed.⁶⁸

Although the privilege's rationale has been questioned,⁶⁹ it resembles that which underlies the attorney-client privilege. The analogy is not a new one,⁷⁰ despite several differences in the way the privileges are applied.

As early as 1894, in *Springer v. Byram*,⁷¹ the Indiana Supreme Court analogized the attorney-client privilege to the physician-patient privilege. Noting that the physician-patient privilege was created by statute, the Court stated:

It was said in *Association v. Beck*, 77 Ind. 203, that the object of these statutes seems to be to place the communications made to physicians in the course of their professional employment upon the same footing with communications made by clients to their attorneys in the course of their employment.⁷²

Further, as to the attorney-client privilege, the *Springer* court examined the scope of the privilege with respect to agents of the attorney:

It has been held that communications made through a third person from a client to a solicitor are privileged, if otherwise entitled to be so; also, whoever represents a lawyer in conference or correspondence with the client is under the same protection as the lawyer himself. The privilege extends to the attorney's clerk, interpreter, assistant attorney, or other agent, while in the discharge of his duty. 19 Am. & Eng. Enc. Law, 131, 132.⁷³

In order for the privilege to apply to the attorney-client relationship, it must first be shown that the communication was intended to be confidential.⁷⁴ Most statutes affording protection to physician-patient

68. *Collins*, 256 Ind. at 232, 268 N.E.2d at 98.

69. See 12 INDIANA PRACTICE, *supra* note 3, § 504.122, at 417; MCCORMICK, *supra* note 20, § 105, at 258. Miller noted that other commentators "have questioned the underlying assumption that assurance of confidentiality is necessary to foster full disclosure to physicians, and . . . have called for abandonment or abolition of the privilege." 12 INDIANA PRACTICE, *supra* note 3, § 504.122, at 417.

70. MCCORMICK, *supra* note 20, § 105, at 258.

71. 36 N.E. 361 (Ind. 1894).

72. *Id.* at 363.

73. *Id.* at 362.

74. MCCORMICK, *supra* note 20, § 91, at 217; 12 INDIANA PRACTICE, *supra* note 3, § 503.103 at 378 (citing *Lewis v. State*, 451 N.E.2d 50 (Ind. 1983)).

communication, however, do not require an initial foundational showing that the communication was intended to be confidential.⁷⁵

As for the presence of third parties during a communication, an agent of an attorney is generally included in the privilege.⁷⁶ Courts appear to analyze the presence of third parties or adjunct personnel with respect to the physician-patient privilege in a variety of ways: 1) whether the third person is a "needed and customary participant in the consultation;"⁷⁷ 2) whether the communication with or to the third person "was functionally related to diagnosis and treatment;" and 3) whether the third person was intended to be included in the privilege pursuant to a statute.⁷⁸

2. *Daymude v. State*.—The reporting statute at issue in *Daymude* provided as follows:

The privileged communication between a husband and wife, between a health care provider and that health care provider's patient, or between a school counselor and a student is not a ground for:

(1) excluding evidence in any judicial proceeding resulting from a report of a child who may be a victim of child abuse or neglect, or relating to the subject matter of such a report; or

(2) failing to report as required by this chapter.⁷⁹

The foregoing statute conflicts with the physician-patient privilege as codified in Indiana Code section 34-1-14-5.⁸⁰

75. IND. CODE § 34-1-14-5 (1990); MCCORMICK, *supra* note 20, § 101, at 249.

76. *Id.* § 91, at 218; 12 INDIANA PRACTICE, *supra* note 3, § 503.103, at 378. See *Brown v. State*, 448 N.E.2d 10 (Ind. 1983) (privilege applied to defendant's statements to a polygraph expert hired by defendant's attorney). *But cf.* *Barnes v. State*, 537 N.E.2d 489 (Ind. 1989).

77. MCCORMICK, *supra* note 20, § 101, at 250 (citing *Shultz*, 417 N.E.2d 1127 to support the view that if the third person is a "needed and customary participant in the consultation," the privilege should be extended to include such third person).

78. *Id.* McCormick criticizes this last method of analysis by contending: "[T]his seems to be sticking in the back of the statute, rather than looking at its purpose. Thus these courts, if casual third persons were present at the consultation, will still close the mouth of the doctor but allow the visitor to speak." *Id.* (citing two old Indiana cases, *Springer*, 36 N.E. at 363 and *Indiana Union Traction Co. v. Thomas*, 44 Ind. App. 468, 88 N.E. 356, 359 (1909)).

79. IND. CODE § 31-6-11-8 (1988).

80. The physician-patient privilege provides in part:

The following persons shall not be competent witnesses:

....

Physicians, as to matters communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases, except as

In *Daymude*, the defendant Daymude's daughter was defined as a "child in need of services" by a public welfare department when the department filed a petition in the juvenile court.⁸¹ The juvenile court then ordered the department to provide services to the daughter and her family. While the daughter was admitted as an in-patient at a hospital, Daymude underwent counseling with Walker, a certified clinic mental health *counselor*.⁸² Walker was an independent contractor working for the hospital under the supervision of the hospital's chief psychiatrist⁸³ for the hospital's child and adolescent division.⁸⁴

During Walker's counseling of Daymude, Daymude revealed information relating to instances of sexual abuse. After the State formally filed charges of child molesting, criminal deviate conduct, and incest, the State attempted to depose Walker concerning communications between Walker and Daymude. Daymude objected to the disclosure on grounds the communications were privileged and confidential and were not abrogated by the reporting statute. The issue was certified to the trial court which overruled Daymude's objection, and then came before the court of appeals via interlocutory appeal.⁸⁵ The parties apparently agreed that a privilege existed.⁸⁶

The court held that pursuant to the reporting statute,⁸⁷ the physician-patient privilege is abrogated only "to the extent that the health care provider must report all suspected or known instances of child abuse."⁸⁸ The court's decision rested on policy reasons and a refusal to construe the abrogation statute broadly. First, the purpose of the reporting statute

provided in IND. CODE 9-4-4.5-7.

IND. CODE § 9-4-4.5-7 has been amended and is now IND. CODE § 9-11-4-6. The statute abrogates the physician-patient privilege with regard to chemical tests performed at the behest of a law enforcement officer. *See* IND. CODE § 9-11-4-6 (1988).

81. *Daymude*, 540 N.E.2d at 1264. A "child in need of services" is defined by IND. CODE § 31-6-4-3 (1988).

82. *Daymude*, 540 N.E.2d at 1264. It is unclear whether Walker was a "certified" psychologist as contemplated by IND. CODE § 25-33-1-17 (1985), which prohibits a certified psychologist from disclosing information acquired from a patient except in limited circumstances. Although IND. CODE § 25-33-1-17 creates a privilege, it does not address the issue of "competency" as a witness as referred to in the physician-patient privilege statute, IND. CODE § 34-1-14-5, *supra* note 80.

83. Because a psychiatrist is a physician, the psychiatrist falls within the privilege. *Summerlin v. State*, 256 Ind. 652, 271 N.E.2d 411 (1971).

84. *Daymude*, 540 N.E.2d at 1264.

85. *Id.*

86. *Id.* at 1265 n.2.

87. IND. CODE § 31-6-11-8 (1988).

88. *Daymude*, 540 N.E.2d at 1265. IND. CODE § 31-6-11-3 (1979) provides that, ". . . any individual who has reason to believe that a child is a victim of child abuse or neglect shall make a report. . ."

had been served because the abuse had already been reported. Second, the family counseling was essential to diagnosis and treatment. The court concluded that if the entire privilege were abrogated, child abusers "will be discouraged from openly and honestly communicating with their counselors."⁸⁹

The *Daymude* court attempted to distinguish the supreme court's opinion in *Baggett v. State*.⁹⁰ In *Baggett*, the supreme court held that the privilege between a husband and wife "is not a ground for excluding evidence in any judicial proceeding resulting from a report of a child who may be a victim of child abuse or neglect, or relating to the subject matter of such a report."⁹¹ *Baggett*'s attorney had failed to object to testimony from *Baggett*'s former wife regarding marital conversations concerning *Baggett*'s admissions to molesting his niece. The supreme court held that because the reporting statute abrogated the marital privilege, there was no basis for finding ineffective assistance of counsel.⁹²

The *Daymude* court distinguished its holding from *Baggett* by arguing that the supreme court had given the abrogation statute a "general interpretation" because the issue on appeal was ineffective assistance of counsel. The court stated:

The supreme court was not faced with the fact specific application of the statute as under the circumstances of this appeal. In the present case, the physician-patient privilege arose as a direct result of therapy ordered by the court during a CHINS proceeding. The privileged communications were made long after the report of the child abuse. Since the abuse already had been reported, the purpose of the reporting statute had been fulfilled. To allow the abrogation of the privileged communication under these specific facts goes beyond the purpose of the statute. Thus, because of the specific facts of the present case, we hold that the physician-patient privilege is not abrogated with regard to confidential communications disclosed by a defendant while participating in counseling sessions ordered by a trial court pursuant to a report of child molesting.⁹³

After *Daymude* was decided, the Indiana Supreme Court also addressed the abrogation statute⁹⁴ in *Davidson v. State*.⁹⁵ *Davidson* was

89. *Daymude*, 540 N.E.2d at 1267.

90. 514 N.E.2d 1244 (Ind. 1987).

91. *Id.* at 1245 (citing IND. CODE ANN. § 31-6-11-8 (Burns 1987)).

92. *Id.*

93. *Daymude*, 540 N.E.2d at 1267-68.

94. IND. CODE § 31-6-11-8 (1988).

95. 558 N.E.2d 1077 (Ind. 1990).

on trial for the murder of two of her children. Her husband testified over objection as to communications from Davidson to him concerning Davidson's methods of disciplining her fourteen month-old son. Davidson argued the privilege applied and was not superseded by the reporting statute because the statute did not apply to murder, but only to abuse and neglect.⁹⁶ Although *Davidson* focuses more on the CHINS abrogation statute⁹⁷ than privilege, it is worth noting because it relies on *Baggett* to the extent *Baggett* found the abrogation statute and abrogation of the marital privilege applicable to child molestation, as well as abuse and neglect.⁹⁸ Curiously, the parties in *Davidson* did not discuss the fact that the purpose of the reporting statute had already been fulfilled as in *Daymude*, nor was *Daymude* even mentioned.

3. *In re C.P.*—Another significant case concerning the physician patient privilege decided during the survey period, *In re C.P.*,⁹⁹ addressed the conceded issue in *Daymude*: whether a counselor supervised by a psychiatrist is included in the physician-patient privilege.¹⁰⁰ *In re C.P.* involved C.P., a delinquent child. L.K.P., C.P.'s mother, was the complaining witness to Indiana's petition alleging incorrigibility of C.P.¹⁰¹

Brown was a social worker and therapist from a community mental health center who diagnosed and treated C.P. the year before L.K.P.'s petition was filed. Like the counselor in *Daymude*, Brown was a counselor who worked under the supervision of a psychiatrist.¹⁰² The Indiana Supreme Court observed:

The evidence revealed that Brown has a bachelor's degree in special education and a master's degree in social work. He is a member of the Academy of Certified Social Workers. He is not, however, a certified psychologist or a psychiatrist. His diagnoses and treatment plans are subject to approval by a supervising psychiatrist with whom Brown consults on each case.¹⁰³

When the incorrigibility charges were filed, L.K.P. executed a "consent to disclose confidential information" allowing disclosure of C.P.'s

96. *Davidson*, 558 N.E.2d at 1090.

97. IND. CODE § 31-6-11-8 (1988).

98. *Baggett*, 514 N.E.2d at 1244. The *Davidson* court noted that the abrogation statute would apply to the murder charge because the statute would apply to the case had no death resulted. Although the abrogation statute addresses child "abuse" or "neglect," to not apply the abrogation statute to murder "would fly in the face of the statute's purpose of protecting children simply because the children died." *Davidson*, 558 N.E.2d at 1091.

99. 563 N.E.2d 1275 (Ind. 1990).

100. *Id.* at 1276.

101. *Id.*

102. *Id.*

103. *Id.*

treatment records from Brown and the mental health center to Walker of the county probation department.¹⁰⁴

When Brown was called to testify, C.P. objected on the ground of privilege. When Walker was called as a witness, he introduced C.P.'s treatment records which he had received pursuant to L.K.P.'s consent. Again, C.P. objected on the grounds of hearsay, physician-patient privilege, and L.K.P.'s invalid consent. Ultimately, the trial court overruled C.P.'s objections, and the case went to the court of appeals on an interlocutory order.¹⁰⁵ The Indiana Supreme Court granted transfer and recently also affirmed the trial court.¹⁰⁶

After making an important distinction, the supreme court held the communications between C.P. and Brown were *not privileged*.¹⁰⁷

We hold that a counselor who aids the psychiatrist is covered by the privilege. By contrast, a counselor who is in fact the caregiver and acts largely independently is not an adjunct to the psychiatrist and thus is not covered by the privilege.¹⁰⁸

To evaluate the supreme court's distinction fully, the court of appeals's opinion is also valuable. The court of appeals had also affirmed the trial court, but for different reasons.¹⁰⁹ In so holding, the appellate court compared C.P.'s communications to Brown with a patient's communications to a nurse. Relying on the holding in *General Accident, Fire & Life Assurance Co. v. Tibbs*,¹¹⁰ the appellate court stated:

Both nurses and social workers, while working under the supervision of a physician, gather patient information and indeed treat patients in their own right, but ultimately treatment must be approved by the physician. If communication between such adjunct personnel and patients is to be privileged, the legislature will have to specifically include such a clause in the privilege statute. We will not extend the physician-patient privilege to include adjunct personnel. But cf. *Daymude v. State* (1989), Ind.App., 540 N.E.2d 1263.

104. *In re C.P.*, 543 N.E.2d 410, 412 (Ind. Ct. App. 1989).

105. *Id.* at 411.

106. *In re C.P.*, 563 N.E.2d 1275 (Ind. 1990).

107. *Id.* at 1276.

108. *Id.*

109. *In re C.P.*, 543 N.E.2d 410.

110. 102 Ind. App. 262, 2 N.E.2d 229 (1936). In *General Accident*, the court held that a nurse's observations of a civil plaintiff's breath [offered to show contributory negligence] were admissible because, "the privilege does not extend to third persons who are present and overhear a conversation . . . unless such third person was necessary for the purpose of transmitting the information to the physician." *Id.* at 268-69, 2 N.E.2d at 232.

...
... We question whether the services received by C.P. are medical treatment as contemplated by the privilege statute.¹¹¹

The Indiana Court of Appeals majority did not mention *Shultz v. State*,¹¹² in which the Second District Court of Appeals held that a technician who drew blood from the defendant at the direction of the doctor was included in the physician-patient privilege.¹¹³ Shultz was involved in a collision with another car. Although the appellate court affirmed the trial court's decision to allow the technician's testimony concerning Shultz's blood alcohol content, the affirmation was based on Shultz's waiver of the privilege during direct examination.¹¹⁴ Nevertheless, the *Shultz* court expressly held that the technician was included in the physician-patient privilege.¹¹⁵ Judge Hoffman's persuasive dissenting opinion in *In re C.P.*, however, likened the *In re C.P.* facts to those in *Shultz*, and reasoned that both the nurse in *Shultz* and Brown in *In re C.P.* communicated with the patients at the behest of the physician:

Mr. Brown's responsibility was to gather information from the patient concerning the patient's background, presenting problem, medical history, social history and psychological status, which information was then submitted to the supervising psychiatrist for the formulation of a treatment plan. Mr. Brown was a necessary organ of communication between the patient and the psychiatrist.¹¹⁶

Unlike the appellate court majority, the Indiana Supreme Court held that communications between adjunct personnel have long been privileged and are privileged when the adjunct personnel is "necessary to enable the parties to communicate with each other."¹¹⁷ Nevertheless, Brown was not included in the privilege.¹¹⁸

111. *In re C.P.*, 543 N.E.2d at 412.

112. 417 N.E.2d 1127 (Ind. Ct. App.), *reh'g denied*, 421 N.E.2d 22 (Ind. Ct. App. 1981). TANFORD AND QUINLAN, INDIANA TRIAL EVIDENCE MANUAL § 46.6, at 263 (2d ed. 1987), concluded that nurses and technicians working under the direction of the physician are "probably included" in the privilege, as did McCORMICK, *supra* note 20, § 101, at 250 (2d ed. 1972).

113. *Shultz*, 417 N.E.2d at 1134.

114. *Id.* Subsequent to the trial in *Shultz*, the legislature enacted IND. CODE § 9-4-4.5-7, which excluded from the privilege the results of chemical blood tests when the prosecutor requests the results as part of an investigation. *Shultz*, 417 N.E.2d at 1135 n.3.

115. *Schultz*, 417 N.E.2d at 1134.

116. *In re C.P.*, 543 N.E.2d at 414.

117. *In re C.P.*, 563 N.E.2d at 1278 (quoting *Springer*, 137 Ind. at 22, 36 N.E. at 363).

118. *Id.* at 1276.

First, the court noted that the physician-patient privilege is conferred by statute and did not exist at common law.¹¹⁹ The court further noted that the statute¹²⁰ does not mention a "privilege;" rather, it states that physicians "shall not be competent witnesses"¹²¹ with respect to communications by patients to the physicians.¹²² Further, despite the statute's wording, the supreme court "has long regarded the statute as erecting a privilege."¹²³ Second, because the "privilege" is statutory and is in derogation of common law, it must be strictly construed.¹²⁴ Third, the court contended that the Indiana Supreme Court "has long recognized that the privilege covers both physicians and those who aid physicians . . .,"¹²⁵ including a "third person" if the third person is "'necessary for the purpose of transmitting information and aiding the physician.'"¹²⁶ The court cited *Shultz*¹²⁷ as support for this rule.

Lastly, the court distinguished counselors and caseworkers who function as primary caregivers, holding that they are not included in the privilege.¹²⁸ In highlighting this distinction between caregivers and a physician's adjunct personnel, the court relied on *In re L.J.M.*¹²⁹ and *Hulett v. State*.¹³⁰ Both *In re L.J.M.* and *Hulett* involved counselors or caseworkers who were *not* certified psychologists and who were working independently, without supervision of a psychiatrist. Because Brown in *In re C.P.* was supervised by a psychiatrist, the court proceeded to measure "the nature and degree of control exercised by the psychiatrist."¹³¹

After examining the testimony from the record, the Indiana Supreme Court held that the "existence of the relationship is a question of fact

119. *Id.* at 1277.

120. IND. CODE § 34-1-14-5(4) (1988).

121. *Id.*

122. *In re C.P.*, 563 N.E.2d at 1277.

123. *Id.*

124. *Id.*

125. *Id.* at 1278 (citing and quoting *Springer*, 137 Ind. 15, 36 N.E. 361, for the proposition that the privilege covers "other persons whose intervention is strictly necessary to enable the parties to communicate with each other").

126. *Id.* (citing and quoting *Doss v. State*, 256 Ind. 174, 181, 267 N.E.2d 385, 390 (1971)). The issue in *Doss*, however, was whether the privilege extended to a deputy sheriff who was present when a physician removed a bullet from the defendant and then gave the bullet to the sheriff. The defendant had objected to the sheriff's testimony regarding his observations.

127. 417 N.E.2d 1127.

128. *In re C.P.*, 563 N.E.2d at 1278.

129. 473 N.E.2d 637 (Ind. Ct. App. 1985).

130. 552 N.E.2d 47 (Ind. Ct. App. 1990).

131. *In re C.P.*, 563 N.E.2d at 1278.

to be determined by the trial court,"¹³² and concluded that the evidence supported the trial court's decision that Brown was not included in the privilege because C.P. never saw the psychiatrist and because Brown worked with very little supervision by the psychiatrist.¹³³ The court relied heavily on a commentator's opinion (which the court quoted) that "'paraprofessionals who are left virtually unsupervised . . . are probably not considered by the patient as psychotherapists and they should not be included in the privilege.'"¹³⁴ It seems the opposite could be argued with the same set of facts; a patient seeing a counselor, infrequently seeing the counselor's supervisor, would more likely look to the counselor as the physician. Further, perhaps the more intervention or supervision by the psychiatrist, the less the patient would rely on the counselor. Unfortunately, however, analysis from the patient's perspective was not the basis of the holding.

In re C.P. appears to be a rather narrow holding, applying only to instances in which the treatment is almost entirely delegated to a third-party not included in the privilege statute. As for treatment by a physician with the assistance of adjunct personnel, *In re C.P.* embraces "functional" analysis for determining whether a patient's communication to the physician's assistant is privileged. Although counselors and case workers, often under the direction of physicians, provide valuable "treatment" for many who arguably view them as physicians, it is clear that communications to such counselors will not be privileged without legislative action. Such action is necessary if society wishes to reinforce the rationale for the physician-patient privilege, to encourage full disclosure by patients in order to ensure proper diagnosis and treatment.

D. Subsequent Remedial Measures

Indiana courts have long followed the common law rule that evidence of remedial measures or repairs by a defendant subsequent to an accident is generally inadmissible to prove a defendant's negligence.¹³⁵ In 1989, the Indiana Court of Appeals expanded application of this rule to exclude evidence of firing an employee after the employee was engaged in allegedly negligent conduct.¹³⁶

132. *Id.* at 1279.

133. *Id.*

134. *Id.* at 1278 (citing and quoting J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE ¶ 504[05], at 504-26 (1989)).

135. See, e.g., *Dukett v. Mausness*, 546 N.E.2d 1292 (Ind. Ct. App. 1989); *Welch v. Railroad Crossing, Inc.*, 488 N.E.2d 383, 392 (Ind. Ct. App. 1986); *City of Indianapolis v. Swanson*, 436 N.E.2d 1179, 1182 (Ind. Ct. App. 1982); *Dudley Sports Co. v. Schmitt*, 151 Ind. App. 217, 279 N.E.2d 266 (1972).

136. *Dukett*, 546 N.E.2d at 1294.

1. *Background*.—The rule concerning treatment of subsequent remedial conduct is well established in Indiana.¹³⁷ Courts following this rule have relied primarily on two rationales supporting application of the rule. The first and most often cited reason for reliance on the rule is premised on public policy. Courts have been reluctant to allow evidence of subsequent remedial conduct because of concern that use of this evidence will deter defendants from making repairs or improvements.¹³⁸ Recognizing that defendants should be encouraged to make repairs rather than deterred by the fear that taking remedial measures will be construed as an admission of guilt, Indiana courts have held that evidence of remedial measures must be excluded.¹³⁹

The second rationale for excluding evidence of subsequent remedial measures stems from doubt over the probative value of such evidence.¹⁴⁰ The primary purpose for offering this type of evidence is to show that the defendant, by his conduct, admitted that he was negligent.¹⁴¹ However, many reasons may exist to explain the defendant's conduct, some of which are not attributable to consciousness of wrongdoing. For example, "evidence of repair may also connote the defendant's exercise of care beyond that required by the law: the plaintiff's having been injured despite the exercise of reasonable care, the defendant turns to measures beyond those required by reasonable care."¹⁴² Although such evidence may be relevant, it poses the danger that a jury would misconstrue the evidence, causing prejudice to the defendant.¹⁴³ Balancing the lack of probative value against the highly prejudicial effect of such evidence, courts have chosen to exclude this type of evidence on most occasions.¹⁴⁴

There are circumstances in which the rule does not apply because the probative value of the evidence outweighs its inherently prejudicial nature. Evidence of subsequent remedial measures has been allowed under the following circumstances: (1) to prove defendant's ownership or control of property;¹⁴⁵ (2) to show the feasibility of preventative

137. See cases cited *supra* note 135.

138. See *Dukett*, 546 N.E.2d at 1294; *Terre Haute & Indianapolis R.R. v. Clem*, 123 Ind. 15, 23 N.E. 965 (1890); 12 INDIANA PRACTICE, *supra* note 3, § 407.101, at 312.

139. See sources cited *supra* note 138. See also 12 INDIANA PRACTICE, *supra* note 3, § 407.101, at 312 (notes that scholars have criticized this rationale as unsound).

140. *Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 388 N.E.2d 541 (1979).

141. See 12 INDIANA PRACTICE, *supra* note 3, § 407.101, at 313.

142. *Id.*

143. *Chapman*, 180 Ind. App. at 41, 388 N.E.2d at 561.

144. *Id.*

145. *City of Indianapolis v. Swanson*, 436 N.E.2d 1179, 1182 (Ind. Ct. App. 1982), *vacated*, 448 N.E.2d 668 (Ind. 1983) (citing *City of Lafayette v. Weaver*, 92 Ind. 477 (1883); *Town of Argos v. Harley*, 114 Ind. App. 290, 49 N.E.2d 552 (1943)).

measures when the defendant denies feasibility;¹⁴⁶ (3) “to prove a faulty condition, later remedied, was the cause of the injury by showing that after the change the injurious effect disappeared;”¹⁴⁷ and (4) impeachment.¹⁴⁸ Interestingly, although these exceptions have been recognized, they have seldom been applied.

2. *Dukett v. Mausness*.—In *Dukett v. Mausness*,¹⁴⁹ two separate actions arose from a collision between Floyd Mausness, and Joseph Dukett, an employee of Indianapolis Yellow Cab, Inc. Mausness’s car was struck by a taxi cab driven by Dukett and owned by Indianapolis Yellow Cab, Inc.¹⁵⁰ In the first action, Mausness’s wife, Waneda, sued Dukett and Yellow Cab for loss of consortium. In the second lawsuit, Yellow Cab sued Floyd Mausness for property damage. In response to the latter action, Mausness filed a counterclaim against Yellow Cab and a cross-claim against Dukett for personal injuries.¹⁵¹ For the sake of efficiency, the trial court consolidated the two actions.¹⁵²

Although the court disposed of the Mausnesses’ claims against Yellow Cab on a directed verdict, it submitted their claims against Dukett to a jury, which returned a verdict in their favor. Yellow Cab was unsuccessful in its claim for property damage.¹⁵³ The Mausnesses then filed a motion for proceedings supplemental, naming Yellow Cab as a garnishee defendant, which was granted by the trial court. Dukett and Yellow Cab appealed. They argued, among other things, that the trial court improperly allowed testimony that Yellow Cab terminated Dukett immediately after the accident.¹⁵⁴ According to Dukett and Yellow Cab, this testimony constituted evidence of subsequent remedial conduct; thus, it was inadmissible.

In a brief decision, the *Dukett* court considered the admissibility of the following testimony of Dukett during the Mausnesses’ case-in-chief:

146. *Id.* (citing *Indianapolis & St. Louis R.R. v. Horst*, 93 U.S. 291 (1876); *Toledo, Wabash and Western R.R. v. Owen*, 43 Ind. 405 (1873); *Hickey v. Kansas City Southern R.R.*, 290 S.W.2d 58 (Mo. 1956)).

147. *Id.* (citing *Kentucky Utilities Co. v. White Star Coal Co.*, 244 Ky. 759, 52 S.W.2d 705 (1923)).

148. *Id.* (citing *Kenney v. Southeastern Pennsylvania Transport*, 581 F.2d 351 (3d Cir. 1978), *cert denied*, 439 U.S. 1073 (1979); *Daggett v. A.T. & S.F.R. Co.*, 48 Cal. 2d 655, 313 P.2d 557 (1957); *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 66 N.E. 882 (1903)).

149. 546 N.E.2d 1292 (Ind. Ct. App. 1989).

150. *Id.* at 1293.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

Q. Did you not state in your deposition, Mr. Dukett, in response to the question, you got fired as a result of this accident on December 12 and your answer was yes.

A. Yes, I used those words.

Q. Now, who did you talk to on that date?

A. I had talked to a

Q. On December 13, the day after the accident? Who fired you?

A. The man who fired me was Mr. Hunt.¹⁵⁵

Counsel for Yellow Cab and Dukett sought to exclude this testimony as evidence of subsequent remedial measures by filing a motion in limine, which was denied, and interposing objections at trial, which were overruled.¹⁵⁶

On appeal, the court only briefly discussed the basis for its ruling. It set forth policy considerations underlying the general rule that evidence of subsequent remedial conduct is generally inadmissible.¹⁵⁷ The court stated that remedial measures should be encouraged, rather than deterred by a fear among defendants that by making subsequent repairs, such conduct can be used as proof of consciousness of wrongdoing.¹⁵⁸ Noting that this rule had never been applied in this context in Indiana, the court of appeals examined cases from other jurisdictions to determine whether evidence of firing can be considered a subsequent remedial measure.¹⁵⁹

In determining the admissibility of evidence of an employee's termination, those courts seemed to rely on the second rationale underlying the rule of conduct by looking to the purpose for the tender of evidence of termination.¹⁶⁰ Finding that the evidence was offered as proof of negligence or as an admission, these courts held that such reasons were not legitimate.¹⁶¹ One court, in *Engle v. United Traction Co.*, recognized that employees are discharged for a variety of reasons, some of which are totally unrelated to an employee's careless or negligent conduct.¹⁶² It found that the discharge of an employee is just as likely to raise

155. *Id.*

156. *Id.*

157. *Id.* at 1294 (citing *Terre Haute & Indianapolis R.R. v. Clem*, 123 Ind. 15, 19, 23 N.E.2d 965, 966 (1890)).

158. *Id.*

159. *Id.*

160. *Rymar v. Lincoln Transit Co.*, 129 N.J.L. 525, 30 A.2d 406 (1946) (trial court improperly admitted evidence of permanent severance of relationship between driver and bus company); *Engel v. United Traction Co.*, 203 N.Y. 321, 96 N.E. 731 (1911) (evidence of discharge of motorman inadmissible); *White v. Missouri Motors Distributing Co.*, 266 Mo. App. 453, 47 S.W.2d 245 (1932) (discharge of driver inadmissible).

161. *See supra* note 129.

162. 203 N.Y. at 323, 96 N.E. at 732.

inferences of legitimate reasons for discharge unrelated to the accident as it is an inference that the discharge was prompted by the employee's negligence.¹⁶³

In *Dukett*, although the Indiana Court of Appeals set forth the policy reason for the rule as the basis for its decision, it actually relied on the rationale followed by other courts in decisions such as *Engle*. The court in *Dukett* found that evidence of Dukett's termination was offered to prove, by Yellow Cab's attitude toward the defendant, that Dukett was careless.¹⁶⁴ Because this evidence was not "legitimate or competent for that purpose," and constituted evidence of subsequent remedial conduct, the court ruled that it should have been excluded at trial.¹⁶⁵ The trial court's failure to exclude such evidence constituted reversible error.

Despite the brevity of the court's decision in *Dukett*, the court's ruling is instructive and helpful to the defense bar in general. When litigation arises involving an employee fired after his or her involvement in a controversy forming the basis of a lawsuit, defense counsel should consider filing a motion in limine to avoid introduction of evidence of the discharge if negligence and liability on the part of the employer or employee is alleged. In addition, the defendant should avoid raising the issue by presenting this evidence directly or by introducing evidence that could justify application of an exception to the rule.¹⁶⁶ Plaintiff may be able to introduce evidence of the discharge by arguing that the defendant waived its right to object by introducing same or similar evidence of its own remedial conduct or by arguing that an exception to the rule applies.

III. FEDERAL EVIDENTIARY ISSUES

A. Amendment to Federal Rule of Evidence 609(a)

In 1990, the United States Supreme Court amended Rule 609(a)(1) and (2) of the Federal Rules of Evidence, which allows use of certain prior convictions to impeach a litigant or witness.¹⁶⁷ Prior to promulgation of these amendments, courts disagreed about Rule 609's interaction with

163. *Id.*

164. 546 N.E.2d at 1294.

165. *Id.*

166. See *supra* notes 145-48 and accompanying text.

167. FED. R. EVID. 609 (a)(1), (2).

Rule 403,¹⁶⁸ which provides for the exclusion of otherwise relevant evidence if the evidence is unduly prejudicial.¹⁶⁹ The rule was amended to lay to rest this confusion among courts and inconsistency in application. To accomplish this goal, two major changes were made. First, the amendment removed from the rule the limitation that a prior conviction can be elicited only on cross-examination.¹⁷⁰ Second, the rule resolves the ambiguity as to the relationship between Rule 609 and 403 by specifically engrafting into the rule the requirement that the general balancing test of Rule 403 be applied.¹⁷¹

1. Application of Rule 609(a)(1), (2) Prior to Amendment.—

Prior to December 1, 1990, Rule 609(a)(1), (2) provided:

(a) GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.¹⁷²

The question of how to interpret this rule in both criminal and civil contexts has been the subject of considerable controversy among courts and commentators.¹⁷³ Some courts held that Rule 609(a) was to be applied in conjunction with Rule 403 with the result being that evidence of prior convictions of witnesses or litigants other than the criminal defendant otherwise admissible under Rule 609 could still be excluded if its probative value was substantially outweighed by its prejudicial effect on any lit-

168. FED. R. EVID. 403. Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

Id.

169. *Id.*

170. FED. R. EVID. 609(a)(1), (2) (effective Dec. 1, 1990).

171. *Id.*

172. *Id.*

173. See *Donald v. Wilson*, 847 F.2d 1191 (6th Cir. 1988); *Wierstak v. Hefferman*, 789 F.2d 968 (1st Cir. 1986). See also Note, *Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403*, 54 *FORDHAM L. REV.* 1063 (1986).

igant.¹⁷⁴ In contrast, other courts held that Rule 609 was all inclusive and was not meant to be read in tandem with Rule 403.¹⁷⁵ Pointing to language of the rule, which was regarded as mandatory, these courts also found that evidence falling within the scope of the rule "shall be admitted," thus precluding any additional consideration under Rule 403 of the probative value or prejudicial effect of the evidence.¹⁷⁶ The Seventh Circuit followed the latter view.¹⁷⁷

In *Campbell v. Greer*, the Seventh Circuit held that except as to defendants in criminal cases, prior convictions meeting the Rule 609(a) requirements were *always* admissible to impeach a witness and were not reviewed to determine whether their probative value outweighs their prejudicial effect.¹⁷⁸ The court found that the trial court was permitted to weigh only the prejudicial effect of such evidence on a defendant in a criminal trial.¹⁷⁹ The court also held that Rule 609 was all-inclusive, meaning that no independent balancing test under Rule 403 could be applied.¹⁸⁰ The Seventh Circuit reaffirmed this view in *Hernandez v. Cepeda*.¹⁸¹

In 1989, the Supreme Court resolved the controversy with regard to civil witnesses and parties in *Green v. Bock Laundry Machine Co.*¹⁸² The Court noted after a review of the Rule's legislative history that the balancing test was intended only to apply to bar impeachment by prior felony convictions when admission of such evidence would unduly prejudice a defendant in a criminal matter.¹⁸³ Thus, in the civil context, the balancing test was inapplicable.¹⁸⁴ Analyzing the mandatory language of Rule 609 and finding that its language prevented an independent application of Rule 403, the Court held that Rule 609(a)(1) "requires a judge to permit impeachment of a civil witness with evidence of prior

174. See, e.g., *Jones v. Board of Police Comm'rs*, 844 F.2d 500 (8th Cir. 1988); *Petty v. IDECO*, 761 F.2d 1146 (5th Cir. 1985); *Czajka v. Hickman*, 703 F.2d 317 (8th Cir. 1983); *Shows v. M/V Red Eagle*, 695 F.2d 114 (5th Cir. 1983).

175. See, e.g., *Cambell v. Greer*, 831 F.2d 700 (7th Cir. 1987); *Diggs v. Lyons*, 741 F.2d 577, 582 (3d Cir. 1984); *United States v. Kuecker*, 740 F.2d 496 (7th Cir. 1984); *United States v. Wong*, 703 F.2d 65 (3d Cir.) (*per curiam*), *cert. denied*, 464 U.S. 842 (1983); see also *McCORMICK*, *supra* note 20, § 43, at 95 (3d ed. 1984); 2 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 416, at 554 (1982).

176. See sources cited *supra* note 175.

177. *Campbell*, 831 F.2d at 706; see also *Hernandez v. Cepeda*, 860 F.2d 260 (7th Cir. 1988).

178. *Campbell*, 831 F.2d at 703-04.

179. *Id.*

180. *Id.* at 706.

181. *Hernandez*, 860 F.2d 260 (7th Cir. 1988).

182. 109 S. Ct. 1981 (1989).

183. *Id.* at 1991-92.

184. *Id.*

felony convictions, regardless of the ensuing unfair prejudice to the witness or the party offering the testimony."¹⁸⁵

The implication of this decision was that a trial court could no longer exercise discretion and balance the probative value of prior convictions against the prejudicial impact of their admission at trial. Rather, under *Bock Laundry*, the court was required to permit such impeachment regardless of its prejudicial effect.¹⁸⁶

The issue of the interaction of Rule 403 with Rule 609 was also raised in criminal cases when prior convictions were used to impeach witnesses to the detriment of the government. There seemed to be confusion as to whether the balancing test applied when the evidence of prior felony convictions of witnesses other than the criminal defendant was offered as impeachment.¹⁸⁷ Some courts determined that Rule 609(a) applied to evidence of witnesses' prior felony convictions without regard to its prejudicial impact on the government.¹⁸⁸ This approach ignored the government's interest in a fair trial and the potential for frustrating this interest by introduction of highly prejudicial impeachment evidence.

Because Rule 609 was the source of so much confusion and discord, amendment was necessary to resolve the conflicts.

2. *The Amended Rule 609 (a)(1), (2)*.—As amended, Rule 609 now reads in relevant part:

(a) General rule.— For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, *subject to Rule 403*, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.¹⁸⁹

As previously noted, this version contains two major changes. First, the rule omits the limitation that the conviction may only be elicited

185. *Id.* at 1993.

186. *Id.*

187. *See, e.g.,* United States v. Thorne, 547 F.2d 56 (8th Cir. 1976); United States v. Nevitt, 563 F.2d 406 (9th Cir. 1977), *cert. denied*, 444 U.S. 847 (1979).

188. *See* cases cited *supra* note 187.

189. FED. R. EVID. 609(a)(1), (2) (effective Dec. 1, 1990) (emphasis added).

on cross-examination.¹⁹⁰ Recognizing the common practice of eliciting this information from witnesses on direct examination to “remove the sting” of the impeachment, the Conference Committee on Rules of Practice and Procedure noted that this limitation was ineffective and found to be inapplicable by virtually every circuit.¹⁹¹

The second change resolves the uncertainty of the relationship between Rule 609 and 403 concerning impeachment of witnesses other than a criminal defendant.¹⁹² The amendment simply provides that the Rule 403 balancing test will be applied when proof of prior convictions is offered as impeachment.¹⁹³ With the exception of the criminal defendant who chooses to testify, this rule applies to all litigants (that is, the civil plaintiff, the civil defendant, and the government in criminal cases).¹⁹⁴ Explaining the purpose for this amendment, the Committee stated:

The amendment reflects the view that it is desirable to protect all litigants from the unfair use of prior convictions, and that the ordinary balancing test of Rule 403, which provides that evidence shall not be excluded unless its prejudicial effect substantially outweighs its probative value, is appropriate for assessing the admissibility of prior convictions for impeachment of any witness other than a criminal defendant.¹⁹⁵

In addition, the Committee stated, “[T]he amendment reflects a judgment that decisions interpreting Rule 609(a) as requiring a trial court to admit convictions in civil cases that have little, if anything, to do with credibility reach undesirable results.”¹⁹⁶

The Committee also clarified the role of Rule 403 with regard to government witnesses. As already stated, the amendment applies to impeachment of government witnesses.¹⁹⁷ The amendment recognizes that the government’s interest in a fair trial may be compromised by evidence of prior convictions to impeach the witness when the prior convictions only remotely relate to credibility.¹⁹⁸ The Committee noted, however, that in most criminal cases it is unlikely that prior convictions of the

190. *Id.*

191. Advisory Committee Note, Amendments to Federal Rules of Evidence — Rule 609, 129 F.R.D. 353 (1990) [hereinafter Committee Note].

192. *Id.*

193. *See supra* note 168 and accompanying text.

194. Committee Note, 129 F.R.D. at 354. *See also* FED. R. EVID. 404 (evidence of other crimes is only admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident).

195. Committee Note, 129 F.R.D. at 353-54.

196. *Id.* at 354.

197. *Id.*

198. *Id.*

ordinary government witness will be unduly prejudicial.¹⁹⁹ Thus, trial courts "will be skeptical when the government objects to impeachment of its witnesses with prior convictions."²⁰⁰

Finally, the Committee noted that amendment of the Rule to include language limiting use of prior convictions only for impeachment purposes is unnecessary because the title of the Rule, its first sentence, and its placement among other impeachment rules clearly show that such evidence can be offered under Rule 609 only for the purpose of impeachment.²⁰¹

3. *Affect of the Amendment in the Seventh Circuit.*—Because courts in the Seventh Circuit previously adhered to the view that the determination of the admissibility of evidence of prior convictions under Rule 609 did not include an analysis under Rule 403, the amendments to Rule 609 represent a substantial change in those courts' approach to such evidence. Although courts routinely allowed such evidence prior to the amendment, they now must engage in an analysis that balances the probative value of the evidence against its prejudicial impact any time evidence of prior convictions is offered to impeach a witness. The effect of this shift will be that evidence of prior convictions is not as likely to be introduced if the opponent of the evidence is aware of the change in the rule and can illustrate the prejudicial impact of the evidence to the court. To take advantage of the benefit of the amendment, counsel should be prepared to argue that introduction of the evidence of prior convictions will be unduly prejudicial.

Thus, civil and criminal litigants who fear that evidence of their own prior convictions or of their witnesses might be introduced for impeachment may wish to file a motion in limine to obtain a pre-trial ruling regarding the admissibility of the evidence, citing the new rule and showing the court the prejudicial impact that would result from admission of such evidence. It is important to note, however, that a trial court's determination of admissibility under Rule 403 is discretionary²⁰² and is unlikely to be overturned on appeal unless the court has abused its discretion. Therefore, it is important to convince the *trial court* of the proper ruling before or during trial rather than attempt to persuade the appellate court of the trial court's harmful error.

B. *The "Frye Test" and Spectrographic Voice Analysis*

In 1989, the Seventh Circuit decided *United States v. Smith*.²⁰³ This decision is noteworthy for two reasons. First, the Seventh Circuit re-

199. *Id.*

200. *Id.* at 354-55.

201. *Id.* at 355.

202. See *Thronson v. Meisels*, 800 F.2d 136 (7th Cir. 1986).

203. 869 F.2d 348 (7th Cir. 1989).

affirmed its commitment to use of the Frye test as a method for assessing the admissibility of scientific evidence.²⁰⁴ Second, applying the Frye test, the court ruled for the first time that expert testimony concerning spectrographic voice analysis is admissible.²⁰⁵

1. *Background*.—Prior to adoption of the Federal Rules of Evidence, courts generally applied a test articulated in *Frye v. United States* to determine the admissibility of scientific evidence and expert testimony premised upon scientific data.²⁰⁶ This standard, known as the Frye test, was set forth in 1923 and described in the following manner:

Just when a scientific principle or discovery crosses a line between experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential forces of a principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction must be made must be sufficiently established to have gained general acceptance in a particular field in which it belongs.²⁰⁷

After the Federal Rules of Evidence were adopted, specifically Federal Rule 702²⁰⁸ and 703,²⁰⁹ the Frye test began being criticized by commentators and abandoned by courts as being unnecessarily restrictive.²¹⁰ The Seventh Circuit, however, has continued to affirm and apply the Frye test.²¹¹

204. *Id.*

205. *Id.*

206. 293 F.2d 1013 (D.C. Cir. 1923).

207. *Id.* at 1014.

208. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702.

209. Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.

210. See *United States v. Hope*, 714 F.2d 1084, 1087 n.3 (11th Cir. 1983); see also *McCORMICK*, *supra* note 20, § 203, at 606-08.

211. *Smith*, 869 F.2d at 351; *United States v. Carmel*, 801 F.2d 997 (7th Cir. 1986); *United States v. Franowski*, 659 F.2d 705 (2d Cir. 1981).

In *Smith*, the Seventh Circuit once again showed its resolve to adhere to the rule, despite this increasing criticism.²¹² In *Smith*, the Seventh Circuit applied the Frye test to determine for the first time the admissibility of expert testimony concerning spectrographics voice identification.²¹³

2. *The Smith Decision*.—Tanya and Tamara Smith, identical twins, were charged with conspiracy to commit bank and wire fraud and substantive counts of bank, credit card, and wire fraud. The twins, posing as bank employees, telephoned various banks and authorized them to make fictitious transfers of nonexistent funds. The women then arranged for other persons to retrieve the money at transferee banks or Western Union. After retaining a small portion of the money themselves, these persons turned the remainder over to the twins.²¹⁴

To establish the twins' identity, a crucial issue at trial, the government called a spectrographic voice identification expert to testify. The expert who testified at trial based his testimony on data compiled by another voice identification expert who was unable to testify at the last minute. After comparing the recorded voices of Tamara and Tanya Smith to the recorded voice of the person who called a number of banks and falsely identified herself as a bank employee attempting to arrange a wire transfer, the expert concluded that it was highly probable that the caller was Tanya Smith rather than Tamara Smith.²¹⁵

Tamara Smith, the appellant, was convicted of thirty-one of the thirty-seven counts with which she was charged. On appeal, Tamara challenged the use of the expert testimony concerning spectrographic voice identification, arguing that voice spectrograms are not generally accepted by the scientific community.²¹⁶

Confronted with this issue of whether to use the Frye test to determine the admissibility of the evidence, the Seventh Circuit declined to depart from precedent. Rather, it reviewed with approval other circuits that applied the Frye test to find that expert testimony concerning spectrographic voice analysis is admissible when the proponent of the testimony has established a proper foundation.²¹⁷

212. 869 F.2d at 351.

213. *Id.*

214. *Id.* at 349-50.

215. *Id.* at 350.

216. *Id.* On appeal, Tamara also argued that admission of the substitute expert's testimony violated her rights to confrontation under the sixth amendment to the Constitution. In addition, she appealed the denial of her motion to sever her trial from that of her sister.

217. *Id.* at 351.

Specifically, the court relied on a two-pronged analysis applied by other circuits.²¹⁸ This inquiry focuses upon whether the scientific technique at issue is reliable and likely to mislead the jury.²¹⁹ With regard to the first element, the court stated that a scientific technique may be reliable if several factors are present, including "the potential rate of error, the existence and maintenance of standards, the care and concern with which a scientific technique has been employed (and whether it appears to lend itself to abuse), and its analogous relationship with other types of scientific techniques."²²⁰ An additional indicia of reliability is the presence of "fail-safe" characteristics, (that is, "characteristics the variability of which will lead to different rather than similar results").²²¹

When discussing the second prong of the analysis, the court emphasized the danger of a jury giving undue weight to scientific evidence because of the apparent objectivity of opinions premised upon scientific data.²²² It noted, however, that the tendency of such evidence to mislead the jury is reduced if the technique is comprehensible to a jury, the jury is able to make the same comparisons as the expert, the evidence is subject to cross-examination, and the trial judge instructs the jury about its responsibility to discredit such evidence if it is found to be unconvincing.²²³

Applying these factors to the facts of the case, the Seventh Circuit found that the government provided ample evidence of the reliability of spectrographic voice analysis through the testimony of the expert regarding the principles and techniques behind voice identification, his own studies, and the studies of other experts as to the reliability of the techniques. Despite the fact that the expert admitted that the technique was not infallible and was not unanimously supported by the scientific community, the court held that the expert's testimony contained several of the indicia of reliability and was therefore sufficiently reliable.²²⁴ The court also held that the presence of the safeguards mentioned above prevented the testimony from misleading the jury.²²⁵ Therefore, because the testimony was both reliable and unlikely to mislead the jury, it was admissible and properly presented to the jury.²²⁶

218. *Id.* (citing *United States v. Williams*, 583 F.2d 1194, 1198-1200 (2d Cir. 1978)). See also *United States v. Baller*, 519 F.2d 463, 465-67 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975).

219. *Smith*, 869 F.2d at 351.

220. *Id.* at 352.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 353-54.

225. *Id.* at 354.

226. *Id.* at 354-55.

3. *Conclusion.*—*Smith* is important for two reasons. First, the court's adherence to the Frye test in the midst of increasing criticism in other jurisdictions counsels attorneys to build the proper foundation for expert testimony under the test in cases involving innovative or new scientific techniques. Proof of the factors set forth above to establish general acceptance in the scientific community may be necessary in such cases. Failure to prepare expert testimony in this manner may result in exclusion of the evidence.

Second, *Smith* is noteworthy because of its determination that spectrographic voice identification passes the Frye test and is admissible in cases in which a sufficient foundation has been laid. It is important to note that the law in the Seventh Circuit now differs from the law followed in Indiana. With regard to spectrographic voice identification, Indiana courts have specifically rejected this technique as unreliable.²²⁷ However, because of the advancement in technology and the increasing acceptance by courts of this scientific technique as reliable, it is likely that an Indiana court will depart from its previous rulings when presented with the issue in the future. In the meantime, attorneys should be aware of the different approaches and should proceed accordingly.

C. Attorney-Client Privilege

Although the law concerning attorney-client privilege is well established in the Seventh Circuit, a recent case provides an interesting example of the application of this doctrine to information concerning the identity of a fee payer who sought legal advice from an attorney.²²⁸ In *In re Grand Jury Proceeding, Cherney*,²²⁹ the Seventh Circuit considered whether the identity of an individual who paid a legal fee is confidential, and therefore privileged. The court held that the identity of the person who paid legal fees was protected by the attorney-client privilege.²³⁰

1. *Background.*—The attorney-client privilege is an evidentiary doctrine that prohibits disclosure of confidential communications between an attorney and a client. This doctrine is premised on the theory that encouragement of full disclosure by a client allows the attorney to act in a matter that is more effective, efficient, and just, and that these benefits outweigh the risks raised by preventing full disclosure in court.²³¹ The privilege is narrowly confined, applying only when necessary to achieve its purpose.²³² Thus, the privilege applies only when a client

227. *Cornett v. State*, 450 N.E.2d 498 (Ind. 1983).

228. *In re Grand Jury Proceeding, Cherney*, 898 F.2d 567 (7th Cir. 1990).

229. *Id.*

230. *Id.*

231. *See Fisher v. United States*, 425 U.S. 391 (1976).

232. *Id.*

makes confidential communications in order to obtain informed legal advice, and does not protect all communications that merely relate to or have a bearing upon the attorney-client relationship.²³³ The determination of whether the privilege protects disclosure of certain information is fact-sensitive and varies from case to case.

2. *The Cherney Case*.—In *Cherney*, the Seventh Circuit considered these general principles in the context of grand jury proceedings in which an attorney refused to disclose the identity of a person who paid his fee to represent another individual.²³⁴ The attorney, who had previously represented a man named Jack Hrvatin in a conspiracy-narcotics trial, was served with a subpoena to appear before a grand jury to answer questions concerning who paid him to represent Hrvatin. The attorney filed a motion to quash the subpoena on the ground that the fee-payer's identity was protected by the attorney-client privilege. After conducting an *in camera* review of documents submitted by the attorney, the district court granted the motion to quash based on application of the privilege. The government appealed.²³⁵

On appeal, the Seventh Circuit cited the general rule that "information regarding a client's fees is not protected by the attorney-client privilege because the payment of fees is not a confidential communication between the attorney and client."²³⁶ Although the court stated that payment of fees is incidental and does not usually involve disclosure of confidential communications, it recognized that under certain circumstances, "disclosure of fee-payer's identity could reveal a confidential communication."²³⁷ Under such circumstances, the privilege applies.²³⁸ The privilege does not apply, however, merely when disclosure of the identity of the fee-payer may be incriminating to that client.²³⁹ Thus, the appropriate inquiry is "whether the revelation of the identity of the fee payer along with information regarding the fee arrangement would reveal a confidential communication" between the attorney and the fee-payer.²⁴⁰

With this in mind, the court turned to the case at bar. It rejected the government's argument that despite the admitted existence of an attorney-client relationship between the attorney and the fee-payer, in-

233. *Cherney*, 898 F.2d at 567.

234. *Id.* at 566.

235. *Id.* at 566-67.

236. *Id.* at 567 (quoting *In re Witnesses Before Special March 1980 Grand Jury*, 729 F.2d 489, 491 (7th Cir. 1984)).

237. *Id.*

238. *Id.*

239. *Id.* at 568.

240. *Id.*

formation regarding the payment of fees could not be confidential.²⁴¹ The court stated that when disclosure of an unknown client's (*i.e.*, fee-payer) identity would reveal the client's motive for seeking legal advice, the client's identity is protected by the privilege.²⁴² It then found that disclosure of the fee-payer's identity would necessarily reveal the fee-payer's involvement in the drug conspiracy and would, therefore, reveal his motive for seeking legal advice.²⁴³ Because the client paid Hrvatin's fees in the same matter giving rise to the attorney-client relationship, the court ruled that disclosure of his identity would, in effect, reveal the substance of a confidential communication.²⁴⁴ In other words, the disclosure would have exposed the very reason that the client fee-payer initially sought legal advice from the attorney. Thus, although this information could have been incriminating, and incriminating information alone is not privileged, it was still shielded by the privilege because it was confidential.²⁴⁵

The court distinguished this situation from the typical case in which the government seeks information about a known client's fee. The court stated that the purpose of that inquiry is usually to determine whether the attorney was paid with illicit funds. Although revelation in that case would probably incriminate the client, it would not risk exposure of a confidential communication.²⁴⁶ In contrast, revelation of the fee-payer's identity in the case at bar would simultaneously reveal a confidential communication.

Finally, although the court recognized the frustration of the government in its effort to learn the identity of a suspected drug felon, it held that these interests had to succumb to interests served by the attorney-client privilege under the circumstances.²⁴⁷

3. *Conclusion.*—Although the Seventh Circuit specifically stated that its holding did not constitute an expansion of the attorney-client privilege,²⁴⁸ its decision provides clues regarding how it may decide similar cases in different contexts in the future. As governmental entities acquire increasing power to inquire about information concerning legal fees, this decision reveals that such power is not unlimited. Attorneys seeking to invoke the privilege on behalf of clients who paid fees should examine their own circumstances to determine whether this case could apply.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 569.

248. *Id.*

IV. CONCLUSION

Attorneys should recognize that numerous cases addressing evidentiary issues have been decided at both the state and federal level during the survey period — too numerous to mention here. This Article intends only to highlight some of the developments in the law of evidence significant to practitioners in federal and state courts in Indiana.

At the state level, this Article discusses the inadmissibility of settlement agreements, foundational requirements for expert testimony when the expert uses formulas, calculations, and information from third parties to form an opinion, the scope of the physician-patient privilege, and the inadmissibility of subsequent remedial measures, including the subsequent firing of an employee who was allegedly negligent.

At the federal level, this Article discusses the recent amendment to Rule 609 of the Federal Rules of Evidence involving impeachment of witnesses with evidence of prior crimes, the Seventh Circuit's use of the Frye test to admit expert testimony concerning spectrographic voice analysis, and a recent application of the attorney-client privilege to protect the identity of a fee-payer.

Survey of Recent Developments in Family Law

DEBORAH L. FARMER*

I. INTRODUCTION

During the survey period, family law decisions have encompassed the usual broad spectrum of property, custody, and support issues. Tax issues have been featured prominently as the appellate courts have struggled with dependency exemptions for children and have dealt with the tax consequences of property division. Also of special importance to the family law practitioner are property division cases now being decided under the statute providing for a rebuttable presumption in favor of an equal division of property.

II. CHILD CUSTODY

Child custody cases decided during the survey period dealt principally with jurisdiction under both the Indiana Dissolution of Marriage Act¹ and the Uniform Child Custody Jurisdiction Act² (hereafter UCCJA), and with modification of custody orders. In keeping with numerous appellate decisions affirming the trial courts' exercise of discretion to make initial custody determinations,³ challenges of original custody decisions are infrequently reported.

A. Jurisdiction

Twice within a six-month period, the Indiana Supreme Court addressed the difference between traditional subject matter jurisdiction and either jurisdiction under the UCCJA or the child custody provision of the Indiana Dissolution of Marriage Act.⁴ In each case, it concluded that a party may voluntarily submit to the jurisdiction of an Indiana court absent a statutory basis for the court's exercise of jurisdiction.

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1. IND. CODE ANN. §§ 31-1-11.5-1 to -28 (West 1979 & Supp. 1990).

2. *Id.* §§ 31-1-11.6-1 to -25 (West 1979 & Supp. 1990).

3. *See, e.g., Wright v. Wright*, 471 N.E.2d 1240 (Ind. Ct. App. 1984).

4. Subject matter jurisdiction is defined as the power to hear and decide a general type or class of cases. The absence of subject matter jurisdiction cannot be waived. *Board of Trustees of New Haven v. City of Fort Wayne*, 268 Ind. 415, 375 N.E.2d 1112 (1978); *Mann v. Mann*, 528 N.E.2d 821 (Ind. Ct. App. 1988).

In *State ex rel. Hight v. Marion Superior Court*,⁵ the parties stipulated at the time of divorce that the husband was not the biological father of the child the wife had been pregnant with at the time of marriage. Nevertheless, the parties agreed that the husband had acknowledged and supported the child, and the dissolution decree ordered him to support the child and granted him visitation rights.⁶ Several years later, when the husband sought a modification of visitation, the wife claimed that the trial court lacked subject matter jurisdiction because the child was not a child of the marriage.

The court concluded that the wife's challenge was not to the trial court's subject matter jurisdiction because the trial court had authority to hear actions for dissolution of marriage and child support.⁷ The wife invoked this jurisdiction when she filed her original dissolution action. The trial court's initial decree was not void and should have been challenged, if at all, in a timely manner.⁸ Justice Dickson wrote for a majority which included Chief Justice Shepard and Justice DeBruler. Justices Givan and Pivarnik dissented without a separate opinion.

The Indiana Supreme Court then addressed a similar issue, involving the UCCJA. In *Williams v. Williams*,⁹ the husband and daughter resided in Indiana, while the wife and son resided in Illinois. An Indiana dissolution of marriage action was filed, and the wife expressly consented to the trial court's jurisdiction. Custody of both children was awarded to the husband even though the son had never lived in Indiana.¹⁰ The court held (Justice DeBruler dissenting) that the wife's conduct in "affirmatively engaging the Indiana courts to determine custody, and expressly consenting to the trial court's authority to determine custody"¹¹ constituted a waiver of her otherwise valid jurisdictional objection.¹²

The issue was nearly identical in *Schneider v. Schneider*.¹³ Following a Wisconsin divorce, the husband remained in Wisconsin and the wife and children moved to Indiana. Both parties filed post-dissolution motions and attended hearings in Indiana until the husband claimed the trial

5. 547 N.E.2d 267 (Ind. 1989).

6. *Id.* at 268.

7. *Id.* at 270 (citing IND. CODE ANN. § 31-1-11.5-3(a) and (b) (West Supp. 1990)).

8. *Id.*

9. 555 N.E.2d 142 (Ind. 1990).

10. *Id.* at 142-43.

11. *Id.* at 145 (DeBruler, J., dissenting).

12. Indiana was not the home state of the Illinois resident son, and the son was not present in Indiana. It did not appear that any state other than Indiana would have jurisdiction. The son had no significant connection with Indiana, as required by IND. CODE ANN. § 31-1-11.6-3 (West 1979).

13. 555 N.E.2d 196 (Ind. Ct. App. 1990).

court lacked personal jurisdiction over him in child support matters.¹⁴ Although the husband apparently did not challenge the trial court's exercise of jurisdiction under the UCCJA in reducing custody and visitation, the court found it was without jurisdiction. The court held that it did, however, have personal jurisdiction over the husband on the child support matter.¹⁵ The court of appeals concluded that the trial court had jurisdiction of all issues.¹⁶

B. Modification

Decisions of both the third and fourth district courts of appeals clarified that a successful action for modification of custody must be based upon proof of a decisive change in the custodial parent's circumstances.

In *Lucht v. Lucht*,¹⁷ the litigants sought to modify a joint custody order by a petition which was filed less than a year after the initial order. The court of appeals noted the express prohibition against indulging a presumption in favor of either parent when making an *initial* custody order.¹⁸ Conversely, the court noted that after an initial custody order is made, a presumption is created in favor of the custodial parent.¹⁹ The noncustodial parent has the burden of showing "changed circumstances so substantial and continuing as to make the existing custody order unreasonable."²⁰

The trial court granted a change of custody, finding a breakdown in communication, a change of locations by the custodial parent, remarriage of the noncustodial parent, and educational problems of the child.²¹ The court of appeals determined that the trial court had approached the case as if it were making an initial custody determination, and that the noncustodial father had failed to carry his burden of proving the existing custody order unreasonable.²² The court specifically noted that a change in the noncustodial parent's lifestyle, such as the father's remarriage, did not warrant modification of custody.²³

Despite different statutory language, the same result was reached by the court of appeals in *Walker v. Chatfield*.²⁴ Walker and Chatfield had

14. *Id.* at 197.

15. *Id.*

16. *Id.* at 200.

17. 555 N.E.2d 833 (Ind. Ct. App. 1990).

18. IND. CODE ANN. § 31-1-11.5-21 (West Supp. 1990).

19. *Lucht*, 555 N.E.2d at 836.

20. IND. CODE ANN. § 31-1-11.5-22(d) (West Supp. 1990).

21. *Lucht*, 555 N.E.2d at 837-39.

22. *Id.* at 836.

23. *Id.* at 838.

24. 555 N.E.2d 490 (Ind. Ct. App. 1990).

a child out of wedlock, and the initial custody award to the mother was made under the applicable paternity statute.²⁵ At the trial level, the father sought and was awarded custody. The court acknowledged the different language between the statutes dealing with custody modification in post-dissolution matters²⁶ and in paternity matters.²⁷

Notwithstanding the different statutory language, the court treated the paternity statute as though it also required a showing of changed circumstances. In so doing, the court expressed disapproval of *Griffith v. Webb*,²⁸ which approved a modification of custody in a paternity case based only upon the best interest of the child and not upon changed circumstances. The court expressed a strong policy favoring permanence and stability and opposing an interpretation of the paternity statute that could give dissenting parents the opportunity to return to court repeatedly to relitigate custody.²⁹

A custody change was also reversed in *Owen v. Owen*.³⁰ There, the custodial mother was hospitalized for psychiatric problems before her divorce. When she was again hospitalized for psychiatric treatment a year later, the father petitioned for a custody change. He obtained an emergency temporary custody order, and the hearing did not finally take place on his petition until nine months later. The father was awarded permanent custody, and the mother appealed.³¹ The court of appeals held that because there was no showing that the mother's condition had worsened after the divorce, the trial court erred in modifying custody.³²

In clearly the most unusual factual setting involving a custody modification, the trial court in *Thompson v. Thompson*³³ ordered that the custodial father would control the marital residence, although it would remain jointly owned by the parties.³⁴ The trial court transferred that control to the mother when she successfully petitioned for a change in

25. IND. CODE ANN. § 31-6-6.1-11 (West Supp. 1990).

26. Indiana Code § 31-1-11.5-21 refers to "the best interest of the child" regarding initial determinations and "changed circumstances" regarding modifications. IND. CODE ANN. § 31-1-11.5-21 (West Supp. 1990).

27. Indiana Code § 31-6-6.1-11 allows modification whenever it "serves the best interests of the child" without regard to changed circumstances. IND. CODE ANN. § 31-6-6.1-11 (West Supp. 1990).

28. 464 N.E.2d 384 (Ind. Ct. App. 1984).

29. *Walker*, 555 N.E.2d at 495.

30. 549 N.E.2d 410 (Ind. Ct. App. 1990).

31. *Id.* at 412.

32. *Id.* at 414-15. Interestingly, the court noted that the trial court erred in refusing to allow discovery of the mother's medical records; the mother had waived the physician-patient privilege because her mental condition was at issue throughout the children's minority. *Id.* at 416 n.2.

33. 555 N.E.2d 1332 (Ind. Ct. App. 1990).

34. *Id.* at 1334.

custody. Citing Indiana Code section 31-1-11.5-12(c), which permits a court to set apart either parent's property for the support of a child, the court reasoned that control of the marital residence was a modifiable award of child support and not a final property division.³⁵ Judge Staton dissented, stating that "a property right has been snatched from the grasp of its lawful titleholder."³⁶

C. Joint Custody

An order of joint custody over the objection of one parent was approved in *Stutz v. Stutz*.³⁷ Significantly, however, the wife's objection was only a general claim of "rancor and hostility" between the parties, supported by the trial court's order that the parties comply with a pamphlet, "Parents are Forever," attached to the decree.³⁸

Relying on Indiana Code section 31-1-11.5-21(g), which provides that the parties' agreement is a matter of "*primary, but not determinative importance*,"³⁹ the court affirmed the award of joint custody. The court relied on evidence in the record that both parents were proper persons to be awarded custody: 1) on a lack of specific evidence in the record regarding hostility between the parties; 2) on the fact that the parties' preliminary agreement provided for joint custody;⁴⁰ and 3) on the parties' shared religious beliefs.⁴¹ The court also noted the lack of a request for specific findings of fact pursuant to Indiana Trial Rule 52(A).⁴²

When going to trial in a case in which joint custody is an issue, the practitioner should request written findings of fact and conclusions of law. The practitioner should also present specific evidence relative to each of the statutory factors⁴³ the court must consider when awarding joint custody. A general claim of inability to get along may not prevent an order of joint custody over one parent's objection.

35. *Id.* at 1336-37.

36. *Id.* 1337 (Staton, J., dissenting).

37. 556 N.E.2d 1346 (Ind. Ct. App. 1990).

38. *Id.* at 1350.

39. IND. CODE ANN. § 31-1-11.5-21(g) (West Supp. 1990) (emphasis added).

40. The court of appeals apparently did not consider Indiana Code § 31-1-11.5-7(f), which provides that the "issuance of a provisional order shall be without prejudice to the rights of the parties or the child as adjudicated at the final hearing in the proceeding." IND. CODE ANN. § 31-1-11.5-7(f) (West Supp. 1990).

41. *Stutz*, 556 N.E.2d at 1350-51.

42. *Id.* at 1351.

43. Indiana Code § 31-1-11.5-21(g) requires the trial court to consider each party's fitness, communications between the parties, the child's wishes, the closeness of the child's relationship with each party, whether the parties live in close proximity to each other, and the home environment of each party. IND. CODE ANN. § 31-1-11.5-21(g) (West Supp. 1990).

III. CHILD SUPPORT

The relatively modest value of the right to claim a child as a dependent for income tax purposes⁴⁴ continues to be a fertile battlefield for litigants and a source of judicial disagreement. Also, divorced parents continue to present new issues and theories in establishing, modifying, collecting, and avoiding child support payments.

A. Tax Dependency Exemption

The First District Court of Appeals of Indiana has issued two opinions addressing the trial court's power to determine which parent should have the benefit of the income tax dependency exemption for a child, and the way in which the trial court can effectuate its determination. Unless the custodial parent executes a waiver of the exemption, the Internal Revenue Code allows the custodial parent to claim the exemption.⁴⁵ In cases decided prior to the survey period, the First District ruled that the trial court lacked authority to allocate the dependency exemption to the noncustodial parent,⁴⁶ and the Second District approved a 1987 trial court determination that the noncustodial parent should have the exemption.⁴⁷

Two cases decided during the survey period have shed some light on the issue. *In re Marriage of Baker*⁴⁸ addressed a modification of a 1979 decree in which two dependency exemptions were divided between the parties. By the time of the modification, the older child was in college. The modification order provided that after the older child graduated, the exemption for the younger child would be alternated.⁴⁹

The court acknowledged conflicting precedent,⁵⁰ but noted that

44. At the 28% federal income tax bracket, the right to claim the \$2090.00 personal exemption for one child is worth less than \$12.00 per week.

45. I.R.C. § 152(e) (1989), *amended by* the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494.

46. *In re Davidson*, 540 N.E.2d 641 (Ind. Ct. App. 1989).

47. *Blickenstaff v. Blickenstaff*, 539 N.E.2d 41 (Ind. Ct. App. 1989). However, the court noted that according to I.R.C. § 152(e) such orders are honored by the Internal Revenue Service only if entered prior to 1985. *Bickerstaff*, 539 N.E.2d at 45 n.1; I.R.C. § 1523 (1986). Neatly sidestepping the issue, the court stated, "So long as Kenneth meets the requirements of the Internal Revenue Code, his claim of the dependency exemption is appropriate." *Bickerstaff*, 539 N.E.2d at 45. The court added, "Suffice it to say that the right of either party to claim a child or children is governed by the Internal Revenue Code." *Id.* at 45 n.1.

48. 550 N.E.2d 82 (Ind. Ct. App. 1990).

49. *Id.* at 83.

50. The court was referring to *In re Davidson*, 540 N.E.2d 641 (Ind. Ct. App. 1989), and *Blickenstaff v. Blickenstaff*, 539 N.E.2d 41 (Ind. Ct. App. 1989).

both decisions implicitly accept, apart from the matter of federal preemption, that the General Assembly has vested Indiana trial courts with both subject matter jurisdiction and statutory authorization to determine which parent should be entitled to claim the exemption, and that Indiana trial courts retain the inherent equitable power to enforce their decrees.⁵¹

The court disagreed with the assumption in *Davidson* that the amendment to Internal Revenue Code section 152(e) leads to the conclusion that state courts were divested of jurisdiction to decide which parent may claim the exemption.⁵²

The opinion contains a concise but thorough discussion of federal preemption and the supremacy clause.⁵³ The court concluded that Congress did not intend to supersede state domestic relations law, and held:

Compliance with § 152(e) and a state court order of allocation is not a physical impossibility. State court orders allocating the exemption can be drafted to conform with the dictates of the section, giving the IRS the objective proof it desires. A custodial spouse's failure to execute the IRS form can be enforced with an adjustment in the amount of support or by threat of civil contempt.⁵⁴

Chief Judge Ratliff dissented, based on the reasoning in *Davidson*.⁵⁵

More recently, the first district considered an appeal of a trial court's decision to reduce the presumptive child support by \$12.80 per week to compensate for the court's finding that according to *Davidson* and to section 152(e), it could not award the dependency exemption to a non-custodial father. In *Ritchey v. Ritchey*,⁵⁶ the court acknowledged the need to reconcile the holdings of *Baker* and *Davidson*.⁵⁷ In a welcome clarification of this issue, the court held that

a trial court has equitable jurisdiction to consider the respective tax burdens of custodial and non-custodial parents and, in a proper case, to order a custodial parent to sign a waiver of dependency exemption. A trial court may make the custodial parent's duty to execute a yearly waiver contingent upon the non-custodial parent's support payments being current. Fur-

51. *Baker*, 550 N.E.2d at 84.

52. *Id.*

53. *Id.* at 84-86.

54. *Id.*

55. *Id.* at 89 (Ratliff, C.J., dissenting).

56. 556 N.E.2d 1376 (Ind. Ct. App. 1990).

57. *Id.* at 1378.

thermore, a trial court can enforce its order against a custodial parent by an order of contempt or by an adjustment of child support payments in an amount representing the additional tax burden upon the non-custodial parent because of the absence of the waiver.⁵⁸

The court also held that a trial court cannot "allocate a dependency exemption and [noted] that even if section 152(e) did not prohibit the allocation, a court order would be ineffective to provide tax relief to the non-custodial parent"⁵⁹ The portion of *Davidson* containing the same holding was affirmed, and to the extent *Baker* held otherwise, *Davidson* was overruled.

Unfortunately, a problem still exists. Child support orders can be modified only prospectively, and not retroactively.⁶⁰ If a child support order is made in connection with an order that the custodial parent execute a waiver at the end of the year when it can be determined that the noncustodial parent is current in support payments, a trial court may not reduce the support obligation for the tax year at issue if the custodial parent refuses at year-end to execute the waiver. The modification can only be ordered prospectively.

B. Modification and Collection of Support

Modification of a support award is governed by Indiana Code section 31-1-11.5-17(a), and enforcement is governed by section 31-1-11.5-17(c). Although these are separate issues, they often are present in the same cases, and are therefore discussed together.

In *Holy v. Lanning*,⁶¹ the support obligor made overpayments both when he was current and when he was delinquent in support. The trial court refused to credit any of the overpayments against the arrearage it found. The court of appeals held that overpayments made when an arrearage existed should have been credited against the arrearage and that to do otherwise would give a delinquent support obligor no incentive to remedy the delinquency.⁶²

Several cases have dealt with support orders in gross for two or more children. *In re Marriage of Baker*⁶³ involved the noncustodial

58. *Id.* at 1379. The court recognized that Child Support Rule 3 permits deviation from the presumptive support award pursuant to the Indiana Child Support Guidelines after consideration of the tax benefit of the dependency exemption. *Id.* at 1379 n.1.

59. *Id.* at 1379 n.1.

60. *See, e.g.,* Pickett v. Pickett, 470 N.E.2d 751 (Ind. Ct. App. 1984).

61. 552 N.E.2d 44 (Ind. Ct. App. 1990).

62. *Id.* at 46.

63. 550 N.E.2d 82 (Ind. Ct. App. 1990).

father's unilateral one-half reduction in support while, by court order, he paid one-half of the college education expenses for the older child.⁶⁴ Although the trial court credited the educational expense payments against the regularly ordered support and found no arrearage, the court of appeals held otherwise. Because the parties had not expressly agreed to an alternate form of payment, the father was only entitled to credit for the payments he made directly to the mother.⁶⁵

Similarly, a unilateral pro rata reduction in an "in gross" support order was not permitted in *Kaplon v. Harris*.⁶⁶ The trial court permitted credit against an arrearage for the pro rata portion of support for a child who died eighteen months before a modification petition was filed. The trial court also gave the father credit against the arrearage for one-half of the funeral expenses he paid for the deceased child.⁶⁷ The court of appeals held those credits were an improper retroactive modification of support,⁶⁸ although in a dissenting opinion Judge Baker asserted that the trial court appropriately allowed credit for the funeral expenses.⁶⁹ He reasoned that the trial court had not retroactively modified the support order but, unlike voluntary payment for expected and ordinary expenses such as clothing and education, had simply apportioned the unexpected funeral expenses between the parties and had effected that apportionment by giving the father a credit against his arrearage.⁷⁰

Unexpectedly large psychiatric expenses for a teenage child warranted a support modification in *Barnes v. Barnes*.⁷¹ The child had undergone hospitalization twice during the pendency of the divorce, as a result of suicide attempts. The decree ordered the father to pay all of the child's psychiatric expenses. Soon after the divorce became final, the child again attempted suicide and was committed for long-term psychiatric treatment expected to last two years and to cost approximately \$300,000.00.⁷² The father sought to have each parent pay one-half of those expenses, and the trial court agreed. The court of appeals, noting that both parents were millionaires, affirmed the modification, reasoning that the enormity of the expenses, as compared to the previous, less-expensive hospitalizations, constituted a change in circumstances warranting a modification.⁷³

64. *Id.* at 86.

65. *Id.* at 87.

66. 552 N.E.2d 528 (Ind. Ct. App. 1990).

67. *Id.* at 529.

68. *Id.* at 530-31.

69. *Id.* at 531-32 (Baker, J., dissenting).

70. *Id.* at 532 (Baker, J., dissenting).

71. 549 N.E.2d 61 (Ind. Ct. App. 1990).

72. *Id.* at 63.

73. *Id.* at 65.

Medical education, as opposed to treatment, was at issue in *Shriver v. Kobold*.⁷⁴ The noncustodial father was ordered to pay one-half of his daughter's college education expenses. He complied, and she graduated from college at age twenty-one. Two months later, her mother sought an order that the father pay for one-half of the cost of medical school.⁷⁵ Both the trial court and the court of appeals reasoned that the original educational order had expired upon her graduation and the father's statutory duty of support had expired on her twenty-first birthday. With no order in effect that could be modified, a new educational order could not be entered.⁷⁶

IV. DIVISION OF PROPERTY

Unlike child custody and visitation issues, in which new case law generally sheds light on statutes that remain largely unchanged, property division cases have dealt most significantly with interpretation of recent statutes.

A. Tax Consequences of Property Division

In 1985, a new statute was enacted directing trial courts when dividing property to consider tax consequences of the property disposition.⁷⁷ The court interpreted the statute in *Harlan v. Harlan*.⁷⁸ The most valuable asset in the Harlans' marital estate was a family corporation awarded to the husband. The trial court attempted to divide equally between the parties the increase in the value of the marital estate. However, in determining the value of the business, the court subtracted the tax that would be incurred if all of the husband's stock were sold even though sale was not ordered and even though the husband was permitted to pay a judgment to the wife over 180 months at three percent annual interest.⁷⁹

The court of appeals reasoned that the statute provides for consideration of tax consequences "necessarily arising from the plan of distribution" but not "speculative possibilities."⁸⁰ Because the trial court's

74. 553 N.E.2d 867 (Ind. Ct. App. 1990).

75. *Id.* at 867.

76. *Id.* at 867-68.

77. Indiana Code § 31-1-11.5-11.1 states: "The court, in determining what is just and reasonable in dividing property, under section 11 of this chapter, shall consider the tax consequences of the property disposition with respect to the present and future economic circumstances of each party." IND. CODE ANN. § 31-1-11.5-11.1 (West Supp. 1990).

78. 544 N.E.2d 553 (Ind. Ct. App. 1989), *aff'd*, 560 N.E.2d 1246 (Ind. 1990).

79. *Harlan*, 544 N.E.2d at 554.

80. *Id.* at 555.

plan of distribution did not require a sale of stock and was structured to avoid the need for a sale, the trial court abused its discretion in subtracting the tax that would be paid upon sale.⁸¹

B. Equal v. Unequal Division

Indiana Code section 3-1-11.5-11(c) directs the courts to "presume that an equal division of the marital property between the parties is just and reasonable," and has been a fruitful source of disputes. Under what circumstances may a trial court deviate from an equal division? How unequal can a just and reasonable division be?

*Kirkman v. Kirkman*⁸² is instructive on the first question. The Indiana Supreme Court recognized that the statute speaks to an exactly, rather than approximately, equal division. Nevertheless, the court held that "express trial court findings will not be compelled for insubstantial deviations from precise mathematical equality."⁸³ However, absent a description in the opinion of the marital estate and how it was divided, it is impossible to tell what constitutes an insubstantial deviation and what requires an express finding of fact supporting an unequal division.

A remand for specific findings was also not warranted in *Benda v. Benda*.⁸⁴ The wife did not appear for the final hearing and therefore presented no evidence of valuation. Neither did the wife request special findings of fact and conclusions of law. The court recognized that although the husband was awarded more property, he was also held responsible for nearly all of the marital debts.⁸⁵ The court of appeals held that the trial court had acted within its discretion.⁸⁶ However, this holding was almost certainly influenced by the wife's refusal to participate in the case and her refusal to aid the court in valuing and dividing the marital estate.

Conversely, two other cases resulted in remands to the trial court for specific findings of fact. In *Raval v. Raval*,⁸⁷ there was no discussion of the value of the marital estate or the extent to which the trial court's division was unequal. The court of appeals simply noted that values of assets were disputed and that both parties proposed an unequal division.⁸⁸ The court remanded for either an equal division or a statement of reasons supporting the unequal division.⁸⁹

81. *Id.* at 556.

82. 555 N.E.2d 1293 (Ind. 1990).

83. *Id.* at 1294.

84. 553 N.E.2d 159 (Ind. Ct. App. 1990).

85. *Id.* at 164.

86. *Id.*

87. 556 N.E.2d 960 (Ind. Ct. App. 1990).

88. *Id.* at 962.

89. *Id.*

In *Crowe v. Crowe*,⁹⁰ the trial court was unable to comply with section 11(c) because the parties were unable to place a value on their business.⁹¹ The court of appeals was unable to determine whether the court equally divided the assets, and therefore remanded the case to the trial court.⁹² This ruling has important implications in cases in which the parties are themselves unable to testify about the value of an asset and are also unable to find or afford an expert witness who can testify about its value.

How unequal can a division be and still be just and reasonable? When one spouse's conduct has been fraudulent,⁹³ a very unequal division is justified. In *Shumaker v. Shumaker*,⁹⁴ the gross marital estate was valued at over \$270,000.00, minus debts of nearly \$17,000.00. The wife forged the husband's name on two notes, which created liens on the couple's assets. Much of the marital estate was brought into the marriage by the husband.⁹⁵ The trial court awarded fifteen percent of the assets to the wife and the remainder to the husband. The court of appeals found that the trial court's articulation of its reasoning justified the unequal division.⁹⁶

An award to the husband of seventy-four percent of the assets, based upon the husband's values, was upheld in *Stutz v. Stutz*.⁹⁷ In making its division, the trial court awarded to the wife a car, furniture, jewelry, her individual retirement accounts, and a judgment for half of the value of a business.⁹⁸ The court, however, did not award her any part of the parties' savings accounts, including \$1.4 million in one account, reasoning that the wife had dissipated the marital assets by incurring large credit card bills and by bouncing checks.⁹⁹ The trial court's unequal division was affirmed.

The inescapable conclusion to be drawn from this year's property division cases is that a trial court is unlikely to commit reversible error if it enters special findings of fact explaining its decision, and that the careful practitioner should request such findings in most cases.

90. 555 N.E.2d 180 (Ind. Ct. App. 1990).

91. *Id.* at 182.

92. *Id.* at 183.

93. According to Indiana Code § 31-1-11.5-11(c)(4), the court may consider, *inter alia*, "the conduct of the parties during the marriage as related to the disposition or dissipation of their property." IND. CODE ANN. § 31-1-11.5-11(c)(4) (West Supp. 1990).

94. 559 N.E.2d 315 (Ind. Ct. App. 1990).

95. Another factor in Indiana Code § 31-1-11.5-11(c)(2) is "the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift." IND. CODE ANN. § 31-1-11.5-11(c)(2) (West Supp. 1990).

96. *Shumaker*, 559 N.E.2d at 318.

97. 556 N.E.2d 1346 (Ind. Ct. App. 1990).

98. *Id.* at 1347.

99. *Id.* at 1348-49.

V. LEGISLATIVE DEVELOPMENTS

For family law practitioners, the most significant legislative developments concern the Indiana Child Support Guidelines and Child Support Rules, adopted by the Indiana Supreme Court on August 31, 1989.¹⁰⁰ Support Rule 2 creates a rebuttable presumption that the application of the guidelines will result in a correct support award. Support Guideline 4 echoes the statutory requirement¹⁰¹ that a child support order may be modified only upon a substantial and continuing change of circumstances.

A new standard for modification of child support in both dissolution and paternity actions has been added.¹⁰² Now, absent any showing of changed circumstances, a support order entered at least twelve months prior to the filing of a petition for modification may be modified if the application of the child support guidelines would result in a support order that differs by at least twenty percent from the previous order.¹⁰³ There are now two alternate bases upon which support can be modified. If the petitioner can show that use of the guidelines would result in a twenty percent difference in child support, there need be no evidence of the circumstances existing at the time of the prior order. If prior orders are several years old, evidence of the circumstances that existed at the time of the prior order can be difficult to obtain. In those cases, this amendment can be very helpful.

New statutes have been added to the Indiana Code which provide for a noncustodial parent's access (in the absence of a court order prohibiting access) to both health records¹⁰⁴ and education records¹⁰⁵ of the children.

The statute providing for temporary protective orders¹⁰⁶ has been amended. Now, a threat of abuse is sufficient to warrant filing a petition for such an order, and the abuse or threat need not have been directed only at the petitioner, but also may have been directed at a member of his or her household.¹⁰⁷ A petition *must* include a request that a date be set for hearing on a permanent protective order.¹⁰⁸ A protective order

100. INDIANA CHILD SUPPORT RULES & GUIDELINES (effective Oct. 1, 1989), IND. CODE ANN. tit. 34, app., supp. at 100 (West Supp. 1990), *reprinted in* IND. CASES 542 N.E.2d XXXI (1989).

101. IND. CODE ANN. § 31-1-11.5-17 (West Supp. 1990).

102. Pub. L. No. 155-1990, 19____ Ind. Acts ____.

103. IND. CODE ANN. § 31-1-11.5-17(a)(2)(A) (West Supp. 1990); *id.* § 31-6-6.1-13(f).

104. *Id.* § 16-4-8-14.

105. *Id.* § 20-10.1-22.4-1.

106. *Id.* § 34-4-5.1-2, *as amended by* Pub. L. No. 26-1990.

107. *Id.* § 34-4-5.1-2(a).

108. *Id.* § 34-4-5.1-2(b)(1).

may include an order for counseling, domestic violence education, or other social services.¹⁰⁹ Similar amendments relate to permanent protective orders.¹¹⁰

An important development is a provision for court appointment of a special advocate or a guardian ad litem for a child in a proceeding to determine or modify custody.¹¹¹

Child support now may become easier to collect. An amendment to Indiana Code section 31-2-10-7¹¹² provides in title IV-D cases for immediate income withholding even when the obligor is not delinquent. Also, delinquent support payments in paternity cases now may bear interest at the same monthly rate, one and one-half percent,¹¹³ as the interest that may accrue on delinquent support payments in dissolution cases.¹¹⁴

VI. CONCLUSION

During the survey period, tax issues were at the forefront of domestic relations cases. The nature of changed circumstances sufficient to warrant a custody modification has been clarified, with the potential for reducing litigation of this emotionally charged issue. The adoption of presumptive child support guidelines appears to have begun to reduce appeals of support orders. On the other hand, the presumption in favor of an equal division of marital assets seems in some cases to have made the trial court's task more difficult and its decisions more susceptible to appeal. Greater emphasis now is placed on the entry of findings of fact and conclusions of law.

109. *Id.* § 34-4-5.1-2(d).

110. *Id.* §§ 34-4-5.1-3, -5.

111. Section 6 of Pub. L. No. 155-1990 added a new section — Indiana Code § 31-1-11.5-28. The statute defines "special advocate" and "guardian ad litem," authorizes the appointment of either or both, directs them to "represent and protect the best interests of the child," authorizes legal representation of the guardian or advocate, designates them as officers of the court, provides civil immunity for their good faith performance of their duties, and allows an order that either or both parents of a child pay a user fee. IND. CODE ANN. § 31-1-11.5-28 (West Supp. 1990).

112. Section 7 of Pub. L. No. 155-1990 added a new subsection (b) to Indiana Code § 31-2-10-7. *See* IND. CODE ANN. § 31-2-10-7 (West Supp. 1990).

113. Section 27 of Pub. L. No. 155-1990 amended Indiana Code § 31-6-6.1-15.5. *See* IND. CODE ANN. § 31-6-6.1-15.5 (West Supp. 1990).

114. *Id.* § 31-1-11.5-12(f).

Health Care Law: A Survey of Recent Developments

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INTRODUCTION

During the 1990 survey period, several judicial and legislative developments significantly affected health care providers within the state. Judicial opinions addressed a number of issues related to health care entities' liability for lack of informed consent, premises liability, vicarious liability for employees' criminal acts, and breach of contract. Judicial opinions affecting the practice of medicine involved physicians' scope of practice, physician-patient privilege, and exhaustion of administrative remedies as a precondition to obtaining reimbursement. The 1990 Indiana General Assembly enacted statutory amendments affecting access to mental health records and health care provider health protection measures. This survey Article will examine recent court decisions and discuss significant developments affecting health care.

I. JUDICIAL OPINIONS

A. *Hospital Liability*

1. *Hospital Liability Related to Informed Consent.*—*Payne v. Marion General Hospital*¹ is a case of first impression in Indiana in which the plaintiff, the estate of Cloyd Payne (Payne), sought to hold the attending physician and the hospital liable for issuing a "No Code" order with regard to the patient. The plaintiff's principal contention was that ordering a "No Code" status for the patient was inappropriate without first obtaining the patient's informed consent.

Payne, a sixty-five-year old man suffering from alcoholism and related complications, allowed his condition to deteriorate to a point requiring hospitalization. On June 6, 1983, he was admitted to the hospital with a diagnosis of malnutrition and uremia. His condition worsened. On June 11, Payne became febrile and his respirations became rapid and labored. Even so, Payne remained awake and alert at times.

On June 11, nurses contacted Payne's sister and described Payne's condition. After Payne's sister arrived at the hospital and observed her

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1. 549 N.E.2d 1043 (Ind. Ct. App. 1990).

brother, she stated that she did not want Payne resuscitated. A nurse contacted the attending physician and informed him of Payne's condition and of his sister's request. After consulting with the nurse and talking to Payne's sister, the physician authorized the entry of a "No Code" order on Payne's medical chart which designated that no efforts were to be made to give Payne cardiopulmonary resuscitation in the event that Payne began to expire. The order was placed in the medical chart according to hospital policy. The hospital continued to give Payne palliative and supportive care. Although Payne's condition continued to worsen, he remained conscious and capable of communicating with the nurses until moments before his death. On June 12, 1983, Payne died and no cardiopulmonary resuscitation was attempted.

Subsequently, the attending physician sued Payne's estate for his fees. The estate counterclaimed, alleging that the physician committed malpractice when he issued the "No Code," and that the hospital was negligent for failing to provide proper procedural safeguards when the physician issued the "No Code" order. The trial court granted summary judgment in favor of the hospital, the physician, and his clinic. The estate appealed.²

In response to the estate's claims that the hospital did not have written policies concerning the issuance of "No Code" orders and that it failed to ensure that the doctor obtained Payne's informed consent before issuing the "No Code," the court found that the estate presented no evidence of policies used by other hospitals nor made a cogent argument as to how the hospital's policies concerning "No Code" orders were deficient.³ The court continued by saying that in order to establish that the hospital fell below the standard of care in its treatment of Payne, the estate must overcome the opinion of the medical review panel. The panel determined that the hospital was not negligent because the estate failed to present evidence specifying how the hospital's actions fell below the requisite standard of care.⁴ Although the estate had presented evidence that the hospital had no written policy concerning "No Code" orders, it failed to demonstrate that other hospitals used written policies or that the absence of a written policy was relevant, and thereby failed to establish a measurable standard of care. Therefore, with regard to the hospital, the court held that summary judgment was appropriate since no evidence existed in the record from which a jury could reasonably conclude that the hospital failed to meet its standard of care.⁵

2. *Id.* at 1045.

3. *Id.* at 1051.

4. *Id.*

5. *Id.*

With regard to the estate's claim against the physician, the court found that material issues of fact existed concerning whether Payne was incompetent and terminally ill so as to permit his attending physician, without first obtaining his informed consent, to issue a "No Code" order.⁶ The estate's evidence indicated that Payne was competent at the time the "No Code" was ordered, and that the physician failed to obtain Payne's informed consent before he issued the "No Code" order. The estate also challenged the physician's determination that Payne was terminally ill, pointing to evidence indicating that the physician had treated Payne for precisely the same conditions approximately one year earlier. The court found that since Payne had previously survived the same condition, whether Payne was terminally ill could not be resolved by reference to undisputed facts.⁷ Therefore, the court held that these material issues of fact precluded summary judgment for the physician.⁸

The decision in *Payne* does not depart from the long-established principal that if a patient is competent, he must make the decisions regarding his care and treatment. The court also intimated that had the plaintiff presented evidence regarding the use of written policies and the relationship of such policies to the issues in the case, the hospital might have been liable.⁹

2. *Hospital Liability Related to Premises Liability*.—Two cases decided in Indiana during this survey period emphasize that Indiana's Medical Malpractice Act (Act)¹⁰ is not so broad as to cover every patient claim. As a matter of law, the Indiana Court of Appeals has held that the Act does not extend to cases of ordinary negligence or premises liability.¹¹ A complaint must allege a "failure of appropriate care" and relate to a scheme of health care in order to fall within the Act.¹² Claims supporting allegations of ordinary negligence, therefore, are not subject to medical review panel determinations.

In *Methodist Hospital of Indiana, Inc. v. Ray*,¹³ a patient brought an action against the hospital alleging that during his hospitalization for a kidney stone removal, the hospital negligently permitted its premises to become infected with the deadly *Legionella Pneumonia* virus. The dispositive issue in the case was whether Ray's complaint sounded in

6. *Id.* at 1050.

7. *Id.*

8. *Id.*

9. *Id.*

10. IND. CODE ANN. § 16-9.5-1-1 to -9-10 (West 1974).

11. See *Methodist Hospital of Indiana, Inc. v. Ray*, 551 N.E.2d 463 (Ind. Ct. App. 1990).

12. *Id.*

13. *Id.*

ordinary negligence for premises liability or whether it asserted a failure to provide the type of care that would bring the claim within the Act, thereby requiring dismissal for lack of subject matter jurisdiction. The court found that the complaint did not allege "failure of appropriate care," and that the allegations did not relate to any type of health care.¹⁴ Rather, it alleged negligent maintenance of the premises unrelated on its face to any scheme of health care.¹⁵ Accordingly, the Court of Appeals affirmed the trial court's denial of the hospital's motion to dismiss on the basis that the plaintiff's case first should have been submitted to a medical review panel pursuant to the Act.¹⁶

The Court of Appeals again considered this issue in *Harts v. Caylor-Nickel Hospital, Inc.*,¹⁷ when a patient brought a claim against the hospital based upon ordinary negligence for an injury sustained when he fell out of bed. In *Harts*, the patient was admitted to the hospital for upper gastrointestinal distress. One day, as Harts attempted to turn himself, he reached for the bed rail but the railing was not placed in an upright position. As a result, Harts fell from the bed and broke his hip.

The jury returned a verdict for Harts, but the trial judge set aside the jury's verdict and entered an order providing in part that the court lacked jurisdiction to proceed because the plaintiff had not followed the Act's required procedure.¹⁸ The defendant hospital contended that the Act mandates that the plaintiff submit a proposed complaint to the Insurance Commissioner for a review and opinion from the Medical Review Panel prior to filing a lawsuit.¹⁹ The plaintiff contended that the raising and lowering of bed rails is merely a ministerial function that can be performed by any individual and consequently fell outside the purview of the Act and squarely within premises liability.²⁰ Therefore, the plaintiff proceeded under the theory of premises liability and brought suit directly.

The Court of Appeals found that the Act is not sufficiently broad as to require that every patient claim be brought under it, and concluded further that Harts's complaint clearly supported an allegation of ordinary negligence.²¹ The court was persuaded that Harts did not allege any breach of duty directly associated with medical negligence that was

14. *Id.* at 466.

15. *Id.*

16. *Id.*

17. 553 N.E.2d 874 (Ind. Ct. App. 1990).

18. *Id.*

19. *Id.* at 876.

20. *Id.* at 879.

21. *Id.* at 878-79.

integral to rendering medical treatment and which would subject his claim to the Act's provisions. Because the court found that Harts's claim was not subject to medical panel review, the court held that the trial court erred in setting aside the jury's verdict and in granting the hospital's motion for judgment on the evidence.²² The court reversed the judgment with instructions that the jury's verdict be reinstated.²³

Judge Sullivan, dissenting in *Harts*, argued that the court in *Ray* stated somewhat broadly that the manner in which the issue is framed is crucial, and that if the complaint sounds in ordinary negligence for premises liability, rather than for failure to provide health care, it is outside the scope of the Act.²⁴ In analyzing *Harts*, Judge Sullivan stated that the majority focused upon the aspect of "ordinary negligence" involved with the hospital personnel's failure to properly secure a bed-rail.²⁵ He noted that the majority seemed to hold that a claim does not fall within the coverage of the Act unless the breach of duty is "directly associated with . . . medical negligence," and that the term "health care" should not be so narrowly construed.²⁶ Bedrails, suggested Judge Sullivan, are features that exist for the facilitation of care and treatment and as a protective mechanism for the patient. Thus, they are integral parts of medical care.²⁷ Judge Sullivan considered the allegations of negligence concerning the positioning of the bedrails to be within the purview of the Act.²⁸

These cases are significant because the court has found that the Act does not extend to cases of ordinary negligence or premises liability even if the allegations relate to acts or omissions of a health care provider with respect to a patient. Although the hospital in *Ray* argued that the court's decision deviated from a "consistent line of reasoning,"²⁹ the court distinguished several previous cases. The *Harts* court, also citing earlier decisions, stated that portions of the Act "are ambiguous as to whether a claim for premises liability by a patient is within the scope of the Act."³⁰ The Act defines malpractice as "any tort or breach of

22. *Id.* at 879.

23. *Id.*

24. *Id.* at 880.

25. *Id.*

26. *Id.*

27. *Id.* at 881.

28. *Id.*

29. *Ray*, 551 N.E.2d at 466 (citing *Winona Memorial Foundation of Indianapolis v. Lomax*, 465 N.E.2d 731 (Ind. Ct. App. 1984) and *Methodist Hospital v. Rioux*, 438 N.E.2d 315 (Ind. Ct. App. 1982)) (court distinguished two "slip and fall" cases finding that if a complaint sounds in ordinary negligence it does not fall within the purview of the Act).

30. *Harts*, 553 N.E.2d at 877. The court noted that court in *Ogle v. St. John's*

contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient.”³¹ The Act also defines a tort as “any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another.”³² The *Harts* court cited Judge Miller’s explanation of the difference between “health care” and “maintenance of safe premises,” which concluded that

the conditions that were the impetus for the legislature’s enactment of the Medical Malpractice Act had nothing to do with the sort of liability any health care provider — whether a hospital or a private practitioner — risks when a patient, or anyone else, is injured by negligent maintenance of the provider’s business premises.³³

3. *Health Care Institutional Liability for Acts of Employees.*—The Indiana Supreme Court, in *Stropes v. Heritage House Childrens Center*,³⁴ held that a health care entity may be vicariously liable for the acts of its employees under the common carrier exception to the respondeat superior doctrine.³⁵ The court found that the Center, which cared for mentally retarded children, assumed a nondelegatable duty to provide protection and care for residents within its charge.³⁶

David Stropes was a severely mentally retarded fourteen-year old with the mental capacity of a five-month old infant, who was placed in the Center as a ward of the Marion County Welfare Department for his maintenance, security, and well-being. A male nurse’s aide employed by the Center was expected to feed, bathe, and change the bedding and clothing of the residents, including David. At the time in question, the

Hickey Memorial Hospital, 473 N.E.2d 1055 (Ind. Ct. App. 1985), the court correctly determined that a psychiatric patient in the defendant’s hospital was subject to the provisions of the Act when she was beaten and raped by another patient. The Act applies because the provision of suitable confinement is an act of medical care the Indiana Legislature expressly recognized as it drafted the health care definition. *Harts*, 553 N.E.2d at 878. Likewise, the court in *Winona Memorial Foundation of Indianapolis v. Lomax* correctly concluded that the plaintiff’s claim was exempt from the Act “when it established that Lomax, a patient at the hospital, tripped and fell on a protruding floor board at a time when she was not under care or treatment of the medical staff. 465 N.E.2d 731 (Ind. Ct. App. 1984).

31. *Harts*, 553 N.E.2d 877 (quoting IND. CODE § 16-9.5-1-1(h) (1989)).

32. *Id.* at 878 (quoting IND. CODE § 16-9.5-1-1(g) (1989)).

33. *Id.* (quoting Judge Miller writing for a unanimous court in *Lomax*, 465 N.E.2d at 739).

34. 547 N.E.2d 244 (Ind. 1989).

35. *Id.*

36. *Id.* at 254.

nurse's aide entered David's room to perform a bed and clothing change. After the aide stripped off the sheets, he allegedly got into bed with David and performed oral and anal sex upon him. This incident was seen and reported by another employee. The aide was charged with and pleaded guilty to criminal deviate conduct and child molestation.³⁷

David, through his representatives, filed a complaint against the Center and the nurse's aide seeking compensatory and punitive damages based in part upon a claim that the Center, as the aide's employer, was responsible for the acts committed by its employee while the employee was on duty. The Center moved for summary judgment, and the trial court granted the motion holding as a matter of law that the act of committing a sexual assault was outside the scope of the aide's employment and, as a result, the plaintiff could not recover against the Center based upon a theory of respondeat superior.³⁸ David amended his complaint and sought recovery under a theory of liability that would hold the Center responsible regardless of whether the acts were within the scope of employment.³⁹ David's motion to correct errors was denied and an appeal ensued. The Indiana Court of Appeals affirmed the decision of the trial court. David petitioned the Indiana Supreme Court, which granted transfer.⁴⁰

The Indiana Supreme Court held that the respondeat superior issue would have to be submitted to a jury, and that the trial court erred in concluding as a matter of law that the acts of the aide were outside the scope of his employment. The Indiana Supreme Court found that although no obligation would otherwise exist, the theory of respondeat superior could lead to an employer's liability for the wrongful acts of its employee that were committed within the scope of employment.⁴¹ "[A]n employee's wrongful act may still fall within the scope of his employment, if his purpose was, to an appreciable extent, to further his employer's business, even if the act was predominately motivated by an intention to benefit the employee himself."⁴²

The court cited several Indiana cases holding employers liable for criminal acts of their employees on the theory that the criminal acts originated in activities so closely associated with the employment relationship as to fall within its scope despite the fact that the crimes were committed to benefit the employee.⁴³ Relying on these prior decisions,

37. *Id.* at 245.

38. *Id.*

39. *Id.* at 246.

40. *Id.*

41. *Id.* at 247.

42. *Id.*

43. *Id.* at 247-49. The court cited and discussed *Gomez v. Adams*, 462 N.E.2d

the court found that the case should have gone to trial for a determination of whether the employee acted to further "to an appreciable extent, . . . his master's business."⁴⁴ Additionally, the court noted that the fact that the complained-of act was a sexual assault was not per se determinative of whether it fell within the scope of the employment.⁴⁵ "The nature of the wrongful act should be a consideration in the assessment of whether and to what extent the [aide's] acts fell within the scope of his employment such that [the Center as the employer] should be held accountable."⁴⁶

The Indiana Supreme Court also considered the propriety of the trial court's dismissal of David's amended complaint in which David argued that by virtue of the nature of the defendant's business, the Center had assumed a nondelegable duty similar to that imposed on common carriers to care for and protect persons entrusted to them.⁴⁷ Thus, the Center may have subjected itself to the extraordinary standard of care that renders common carriers liable for injuries inflicted on passengers by employees regardless of whether those acts fall within the scope of employment. The court concluded that when the Center accepted David as a resident, it was fully cognizant of the disabilities and infirmities he suffered that rendered him unable to care for himself and which, in fact, formed the basis of their relationship.⁴⁸ The entire responsibility for David would be upon the Center, and the performance of necessary caregiving tasks would be delegated to employees.⁴⁹ The degree of David's lack of autonomy and his total dependence on the Center for care and protection, as well as the degree of the Center's control over David, led the court to conclude that the Center assumed a nondelegable duty to provide protection and care so as to fall within the common carrier exception.⁵⁰

212 (Ind. Ct. App. 1984) in which a security officer employed by a private security agency arrested Adams and confiscated his personal identification. Although officers were not authorized to retain items for their personal use, the officer kept Adams's confiscated identification past the end of his shift and later used it to cash a check. The guard forged Adams's name. The court held that the security agency did not escape liability for the conversion because sufficient evidence was presented to allow the jury to reasonably conclude that the officer was within the scope of his employment when he converted the check-cashing card for his own use. *Id.* at 217. The *Stropes* court found that although the judgment in *Gomez* was reversed, it was not because respondeat superior did not apply to these circumstances. 547 N.E.2d at 247-49.

44. *Id.* (quoting *Stropes*, 547 N.E.2d at 249).

45. *Id.*

46. *Id.*

47. *Id.* at 253-54.

48. *Id.*

49. *Id.*

50. *Id.* at 254.

In a vigorous dissenting opinion, Judge Givan noted that the majority opinion established a major difference in Indiana law that would virtually force every health care and custodial institution to be an insurer of the safety for persons under their care and control.⁵¹ The ramifications of this case suggest that a higher standard of care for the protection and safety of patients may be imposed on health care entities. Prior to this decision, health care entities owed a duty to exercise reasonable care in protecting patients.⁵² The common carrier exception imposes a much higher standard of care, comparable to that of a guarantor.

Based upon this holding, health care entities may be exposed to greater liability than in the past, particularly if they have patients who are especially vulnerable and dependant upon the facility for total care and protection.

4. *Expert Testimony Required to Establish Hospital Standard of Care.*—In *Kopec v. Memorial Hospital of South Bend, Inc.*,⁵³ the court held that a physician's affidavit was sufficient to provide expert testimony necessary to rebut a medical review panel's opinion that the defendant hospital's conduct met an appropriate standard of care.⁵⁴ In *Kopec*, the plaintiff filed a proposed wrongful death complaint naming, among others, the hospital. The medical review panel concluded that the evidence presented did not support the conclusion that the hospital failed to meet the applicable standard of care.⁵⁵ *Kopec* filed suit after the panel's decision was issued, and the hospital and doctor moved for summary judgment utilizing the opinion of the review panel as expert testimony that they were not negligent. Two days before the hearing on the motion for summary judgment, *Kopec* filed a memorandum in opposition supported by an affidavit from an expert witness, one Dr. Raff. The trial court denied the defendant doctor's motions, and granted the hospital's.⁵⁶

Kopec appealed the summary judgment motion entered in favor of the hospital, contending that the trial court incorrectly granted the hospital's motion because *Kopec* demonstrated through Dr. Raff's affidavit that genuine issues of material fact existed as to whether the hospital's conduct fell below the appropriate standard of care, thus breaching its duty to the decedent, the late husband of the plaintiff. The court disagreed with the hospital's assertion that *Kopec* failed to

51. *Id.* at 255 (Given, J., dissenting).

52. *Id.*

53. 557 N.E.2d 1367 (Ind. Ct. App. 1990).

54. *Id.* at 1370.

55. *Id.* at 1368.

56. *Id.*

establish the existence of a genuine issue of fact concerning any of the basic elements of her claim.⁵⁷

The court instead found that the evidence clearly established that the hospital owed a duty to the decedent and that the hospital's duty arose from the decedent's status as a patient.⁵⁸ The court found that Dr. Raff's affidavit provided the necessary expert medical opinion concerning breach of duty and causation to demonstrate the existence of an issue for trial in the case.⁵⁹ While the court found that the affidavit lacked certain breadth because it failed to recite more factual data, Dr. Raff's affidavit did show that he had sufficient training and experience to qualify as an expert and that he was familiar with the standard of care that constituted the average level of skill practiced in the locality in question.⁶⁰ Because Dr. Raff established that he was familiar with the standard of care practiced in the locality, the court found that he was qualified to give his opinion that the hospital breached that standard of care.⁶¹ Dr. Raff's affidavit asserted that the hospital failed to appropriately monitor the patient's condition while he was receiving antibiotic therapy and that such failure proximately caused the patient's death.⁶²

Although the court emphasized that the detailing of factual circumstances would affect the weight and credibility to be given to expert statements, the court found that Dr. Raff's conclusory opinion was sufficient and would be admissible.⁶³ Because the hospital did not challenge Dr. Raff's qualifications as an expert, the court determined that the affidavit met the minimum standards for admissibility.⁶⁴ The motion for summary judgment in favor of the hospital was reversed.⁶⁵

5. *Hospital Liability for Breach of Contract.*—Dr. Bain, the president of a corporation that supplied radiology services to a hospital, contested the grant of summary judgment in favor of the hospital in *Bain v. Board of Trustees of Starke Memorial Hospital*.⁶⁶ The court, agreeing with Bain, found that under the law of contracts and agency, genuine issues of material fact existed and thereby precluded summary judgment.⁶⁷

57. *Id.*

58. *Id.*

59. *Id.* at 1369.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1370.

65. *Id.*

66. 550 N.E.2d 106 (Ind. Ct. App. 1990).

67. *Id.* at 110-11.

In November 1972, Bain, then president and shareholder of X-Ray & Nuclear Physicians, Inc. (X-Ray), first contracted with the hospital to provide radiology services. The contract was signed only by Bain and the hospital's executive director. Other contracts negotiated between 1975 and 1985 were signed only by Bain and the acting executive director of the hospital. In 1982, a three-year service contract was executed by Bain and the executive director, Spencer Grover.

In August, Bain received a "generic" proposed contract from Grover. During a September 1985 meeting, the hospital finance committee altered this contract and authorized Grover to submit it to Bain as a "final offer," which Grover did along with an explanatory letter. Although the letter did not indicate that further board action was required, Grover's affidavit stated that he told Bain that board approval would be required and that the contract provided a signature line for the hospital's chairman of the board. In his deposition, Bain stated that Grover did not inform him that board approval was required.

On September 13, 1985, Bain and Grover signed two copies of the contract, dating them September 24, 1985. Grover kept both signature pages. On September 24, 1985, the board voted not to ratify the contract, although the minutes did not specifically reflect that the contract was not ratified.

On October 30, 1986, Bain filed a complaint against the Board of Trustees of Starke Memorial Hospital and certain individual members of the board alleging, among other things, breach of contract. Without entering findings of fact, the trial court granted summary judgment in favor of the hospital.⁶⁸

Bain appealed the trial court's decision, contending that summary judgment was improper because genuine issues of fact existed concerning the parties' intent, including whether the executive director had authority to bind the hospital, whether the finance committee had authority to extend an offer to Bain, and finally, whether the hospital executed the contract. The hospital argued that the summary judgment was proper, asserting that there was no execution by the hospital and no delivery of the contract to Bain.⁶⁹

The court acknowledged that the question in this case concerned not actual authority, but apparent authority with regard to who had authority to contractually bind the hospital.⁷⁰ The court then concluded that Bain's belief in the apparent authority of Grover and the finance

68. *Id.* at 108.

69. *Id.*

70. *Id.*

committee would not be unjustified.⁷¹ Rather, the court found several facts that indicated that Bain could have reasonably believed these persons had authority to act on behalf of the board and the hospital.⁷² The court seemed persuaded by the fact that previous contracts were signed only by Bain and the executive director and were honored by the hospital and the board.⁷³ The court dismissed the hospital's argument that Bain should have known that subsequent Board ratification was required because Bain had executed other contracts.⁷⁴ The court held that genuine issues of material fact existed as to whether Bain could have reasonably believed that the hospital's executive director had authority to execute a contract on behalf of the finance committee and bind the hospital, so as to preclude summary judgment on the issue of whether the contract existed pursuant to the doctrine of apparent authority.⁷⁵

Regarding the question of whether the document in question could be an enforceable contract, the court determined that the facts allowed for the inference that proper formation of a contract had occurred.⁷⁶ The court noted that the facts did not preclude the possibility that the hospital extended an offer to Bain, who accepted it, thus forming a contract.⁷⁷ The court further stated that if the hospital had extended a "final offer" to Bain and Bain had accepted it, a contract would have come into existence at that time, and reacceptance and a second delivery by the hospital would be unnecessary.⁷⁸ Therefore, with regard to the question of whether a contract was formed, the court held that genuine issues of material fact existed as to whether the hospital extended the offer to Bain so as to preclude summary judgment.⁷⁹

This case is significant because managers of various hospital departments are often involved in contract negotiations and communicate directly with parties who seek agreements. These parties may not be aware of which persons have sufficient authority to bind the hospital to contractual terms. Persons granted authority to contract need to be identified and the contract process should be established and clearly communicated to employees as well as outsiders. Otherwise, a contract based upon past dealings and the doctrine of apparent authority may be the unintended result.

71. *Id.*

72. *Id.* at 109.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 110.

77. *Id.*

78. *Id.* at 111.

79. *Id.*

B. Medical Liability Issues

1. *Scope of Practice—Medical Specialty.*—In *Dove by Dove v. Ruff*,⁸⁰ Nathan Dove, a ten-year old patient of Dr. Ruff, suffered a severe anaphylactic reaction which caused serious and irreversible brain damage, after receiving an injection of a drug prepared by Dr. Ruff. Dr. Ruff, an allergist, sold Nathan's parents injectable medication that he prepared from a combination of solutions from pharmaceutical companies. The medication was delivered to the parents in a multidose vial and was to be administered by a licensed practical nurse designated by the parents.

After Nathan's adverse reaction, his parents filed "an action against Dr. Ruff alleging products liability, strict liability in tort, and breach of warranty on a theory that Dr. Ruff compounded, manufactured, dispensed and sold a drug product that was in a defective condition and unreasonably dangerous."⁸¹ Dr. Ruff moved for, and the trial court granted, summary judgment on the ground that the plaintiff's claims were covered under the Indiana Medical Malpractice Act (Act).⁸² The Indiana Court of Appeals affirmed, finding that Dr. Ruff was acting within the scope of practice of an allergist when he compounded and dispensed the medication, and upheld the trial court's finding that any negligence in the performance of those functions properly fell within the scope and purpose of the Act.⁸³

The Doves argued that the trial court erred in entering summary judgment because torts arising from compounding and dispensing of drugs are outside the practice of medicine and therefore are not covered by the Act. "The Doves contended that since compounding and dispensing of drugs is not specifically authorized by the descriptive terminology of the practice of medicine, it necessarily constitutes the unauthorized practice of pharmacy if undertaken by a physician."⁸⁴

The court of appeals agreed with Dr. Ruff, and stated that statutory definitions such as the practice of medicine are descriptive, but not all encompassing.⁸⁵ Some overlap in responsibilities exists. The court cited the phrase in Indiana Code section 25-22.5-1-1.1(a)(1)(B) in which the practice of medicine is defined in part to mean "holding oneself out to the public as being engaged in the suggestion, recommendation or prescription or administration of any form of treatment, without limi-

80. 558 N.E.2d 836 (Ind. Ct. App. 1990).

81. *Id.* at 837.

82. *Id.*

83. *Id.* at 841.

84. *Id.* at 838.

85. *Id.*

tation.”⁸⁶ The words “without limitation” suggested to the court that the scope of a physician’s responsibilities is not limited to those responsibilities specifically set out in the statute.⁸⁷ Additionally, the court looked to other statutory provisions, including the Indiana Legend Drug Act⁸⁸ which indicated that the legislature considered “that a physician might also engage in some activities which might be considered [to be] ‘manufacturing’ under most circumstances, but are not considered to be manufacturing . . . when a physician performs the acts while properly engaged in the practice of medicine.”⁸⁹

The court considered whether the medication was a product destined for inclusion within Indiana’s Product Liability Act.⁹⁰ The court concluded that the incidental furnishing of supplies “during the course of medical treatment does not create a buyer-seller relationship between a patient and his physician which could give rise to an implied or express warranty.”⁹¹ The court dismissed the theory of strict liability by determining that the seller of the product must be engaged in the business of selling that item for there to be any liability. Here, the physician treating and diagnosing a patient was not generally selling a product, but selling a service. In the court’s judgment, when Dr. Ruff mixed and provided a medication for Nathan, he was performing an act that was authorized under the statutory definition of the practice of medicine.⁹² Thus, the sale of the medication was incidental to the delivery of medical services.⁹³

The court also dismissed the notion that this case involved premises liability.⁹⁴ The court found that Dr. Ruff was acting within the scope of his practice as an allergist, and therefore his actions in administering the medication, including the preparation of the mixture and any failure to give warnings of side effects, fell within the scope of the Act.⁹⁵

86. *Id.* (emphasis in original).

87. *Id.*

88. IND. CODE ANN. § 16-6-8-1 (West 1989).

89. *Dove*, 558 N.E.2d at 838.

90. IND. CODE ANN. § 33-1-1.5-1 (West Supp. 1990).

91. *Dove*, 338 N.E.2d at 837.

92. *Id.* at 840.

93. *Id.*

94. *Id.*

95. *Id.* at 841. The majority noted that Dr. Ruff’s malpractice insurance covered the combining of medications to be used in the treatment of his patients. While recognizing that it was not bound by what the insurance company thought the law was, the court found that this provided some indication that the medical profession and the insurance industry regarded Dr. Ruff’s acts as within the practice of his medical specialty. *Id.* Judge Sullivan, while concurring in the majority opinion, remarked that insurance coverage was wholly irrelevant to the issue before the court and did not bear upon whether the conduct constituted the practice of medicine within the contemplation of the Act. *Id.* (Sullivan, J., concurring).

2. *Physician's Standard of Care and Use of Admissions.*—In *Farrar v. Nelson*,⁹⁶ the court held that it was for the jury to determine whether medical malpractice was committed, and so it must be permitted to consider all relevant evidence.⁹⁷ At issue was whether the opinion of the medical review panel should be admissible.⁹⁸ The court held that the trial court did not err in admitting the opinion of the medical review panel.⁹⁹

The plaintiff, Farrar, was a patient of Dr. Nelson from 1971 to 1985. While being treated for a thyroid condition, he complained to Dr. Nelson of impotence, testicular atrophy, and loss of pubic and other hair. In 1985, he was admitted to the hospital for hypopituitarism.

The plaintiff filed a medical malpractice claim alleging that the defendant was negligent in his care. The medical review panel found in favor of the defendant. The jury found in favor of the defendant at trial. Appellants appealed from the adverse judgment, complaining that the medical review panel's opinion, which found that the evidence failed to support the conclusion that the defendant doctor did not meet the applicable standard of care, should not have been admitted.¹⁰⁰ Both parties conceded that any portion of the expert opinion of the medical review panel is admissible as evidence in a subsequent action. The appellants objected to the admission of the panel's opinion, claiming that it directly contradicted facts that were conclusively established by the defendant in his response to a request for admission.

Prior to admission of the medical review panel's opinion, the court admitted the defendant's responses to requests for admissions without objection. These admissions included statements by Dr. Nelson that he had a legal duty to consider the differential diagnoses that may have caused the patient's illness and that he should have considered, as one of the alternative diagnoses, a pituitary problem. Notably, Dr. Nelson's admissions also indicated that a reasonable standard of care did not mandate this alternative diagnosis.¹⁰¹ Dr. Nelson denied that he should have considered, as one of the alternative causes for the plaintiff's impotence and related symptoms, a condition or malady that was affecting the pituitary gland.¹⁰²

96. 551 N.E.2d 862 (Ind. Ct. App. 1990) (court erroneously refers to the Medical Review Board rather than the Medical Review Panel as defined in the Indiana Malpractice Act. IND. CODE § 16-9.5-1 (1990).

97. 551 N.E.2d at 865.

98. *Id.*

99. *Id.*

100. *Id.* at 864.

101. *Id.*

102. *Id.* at 865.

The court stated that "a physician is required only to exercise reasonable and ordinary skill in administering reasonable and ordinary care."¹⁰³ Indiana recognizes that a physician's mistaken diagnosis does not constitute negligence when the physician used reasonable skill and care in formulating a diagnosis.¹⁰⁴ Mere proof that a diagnosis was wrong will not support a verdict for damages.¹⁰⁵

The court determined that Dr. Nelson's admissions did not "irrefutably lead to a finding of medical malpractice."¹⁰⁶ Instead, the court concluded that Dr. Nelson's admissions were "at best, tantamount to an admission of a misdiagnosis" and "a misdiagnosis does not necessarily constitute medical malpractice."¹⁰⁷ Thus, the medical review panel's opinion in favor of the physician was admissible over plaintiff's objections.¹⁰⁸

3. *Physician-Patient Privilege*.—The court of appeals in *State v. Robbins*¹⁰⁹ held that the Indiana statute specifying circumstances that permit the state to require a physician to obtain blood, urine, or a bodily substance sample from the subject of an investigation was a limit on the defendant's right to invoke the physician-patient privilege.¹¹⁰ In *Robbins*, the court reversed the lower court's order suppressing the results of a serum blood alcohol test performed on the defendant following a one-car accident.¹¹¹ The defendant was charged with offenses related to the operation of a motor vehicle while intoxicated.¹¹²

Indiana Code section 9-11-4-6(g) permits the state to require a reluctant physician to draw a blood sample when certain conditions are met.¹¹³ "Prior to the enactment of subsection (g), a physician or a member of the hospital staff could avoid turning evidence of intoxication over to the state by refusing to draw a blood sample or conduct a chemical test."¹¹⁴ The statute, as amended, still permits a physician to refuse to perform a chemical test, even if subsection (g) is satisfied because subsection (f) states that "[n]othing in this section requires a physician or a person under the direction of a physician to perform a

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. 549 N.E.2d 1107 (Ind. Ct. App. 1990).

110. *Id.* at 1109-10.

111. *Id.* at 1110.

112. *Id.*

113. IND. CODE § 9-11-4-6(g) (1988).

114. *Robbins*, 549 N.E.2d at 1110.

chemical test."¹¹⁵ Once the test is performed, however, subsection (a) requires that the test results be turned over to the state.¹¹⁶

In *Robbins*, the court found no evidence that the attending physician was reluctant to draw the blood sample; therefore, the court held that subsection (g) did not apply.¹¹⁷ Because the blood alcohol test was performed, subsection (a) required that the results be turned over to the state.¹¹⁸

The clear import of this statute is to limit the defendant's right to invoke the physician-patient privilege to prevent disclosure of blood alcohol results that might otherwise be construed as privileged information. This statute narrows the scope of the physician-patient privilege, requiring a physician to divulge the results of a blood alcohol test when requested to do so by the state.

4. *Exhaustion of Administrative Remedies Required.*—The Indiana Court of Appeals has determined that a physician is required to exhaust administrative remedies by appealing to the Indiana Department of Public Welfare in order to obtain reimbursement under the Hospital Care for the Indigent Act.¹¹⁹ In *Vandiver, M.D. v. Marion County*,¹²⁰ Dr. Vandiver brought an action against the Marion County Department of Public Welfare and county officials to obtain reimbursement under the Hospital Care for the Indigent Act. The circuit court entered summary judgment in favor of the defendants. The department's motion for summary judgment was premised in part upon the contention that Dr. Vandiver failed to exhaust administrative remedies.¹²¹ The physician appealed.

In his complaint, Dr. Vandiver alleged that he was a member of a class of Marion County physicians entitled to compensation for medical services rendered prior to January 1, 1987 to certain indigent persons. Dr. Vandiver provided emergency medical treatment in a qualified hospital. Application was made for each of the patients, and the applications were investigated by the county welfare department. The department determined that the patients were eligible to receive assistance in the payment of their medical and hospital expense pursuant to Indiana's Hospital Care for the Indigent Act.¹²² The department and county defendants refused to pay Dr. Vandiver for his services.

115. IND. CODE § 9-11-4-6(g) (1988).

116. *Id.* § 9-11-4-6(a).

117. *Robbins*, 549 N.E.2d at 1110.

118. *Id.*

119. IND. CODE § 12-5-6-2 (1989) (repealed as amended by IND. CODE ANN. § 12-5-6-2 (West Supp. 1990)).

120. 555 N.E.2d 839 (Ind. Ct. App. 1990).

121. *Id.* at 843.

122. IND. CODE § 12-5-6-2 (1989) (repealed as amended by IND. CODE ANN. § 12-5-6-2 (West Supp. 1990)).

The court of appeals noted that Dr. Vandiver did not offer evidence that he appealed to the state welfare department for an administrative order directing the department to pay the reasonable costs of his services.¹²³ Additionally, Dr. Vandiver did not argue that under the circumstances, exhaustion of remedies was not required. Dr. Vandiver did contend that the defendants acted in bad faith and refused to pay a single provider claim according to the procedure provided by the Act.

The court of appeals found no evidence that an appeal to the state department would have been fruitless.¹²⁴ "To the contrary, the court indicated that Dr. Vandiver's own exhibits demonstrated that the state department interpreted the Act, before and after the 1986 amendment, to allow compensation directly to physicians for medical services rendered to an individual deemed to be eligible for Hospital Care for the Indigent benefits."¹²⁵

Despite the determination that Dr. Vandiver's action was judiciable and that he had standing to request an interpretation of the Act, the court agreed with the department, and held that the trial court correctly refused to exercise jurisdiction.¹²⁶ Resort to the judicial process must be postponed until all administrative remedies capable of rectifying the claimed error have been pursued to finality. Indiana Code section 12-5-6-8 provides:

If any county department of public welfare . . . fails or refuses to accept responsibility for payment of medical or hospital care under this chapter; any person affected may appeal to the state department of public welfare [T]he state department of public welfare shall determine the eligibility of the person for payment of cost of medical or hospital care . . . and if found to be eligible, shall determine the responsible county and the reasonable costs of such care due the persons furnishing the care. A person aggrieved by the determination may appeal the determination under [Indiana Code section] 4-22-1."¹²⁷

"Compliance with statutory requirements and an action for judicial review of an administrative adjudication [were] considered conditions precedent to the exercise of jurisdiction by a trial court."¹²⁸ A plaintiff who fails to avail himself of a statutory remedy is precluded from bringing an independent action for relief. The court concluded that the

123. *Vandiver*, 555 N.E.2d at 843.

124. *Id.*

125. *Id.*

126. *Id.*

127. IND. CODE § 12-5-6-8 (1981).

128. *Vandiver*, 555 N.E.2d at 843.

record established that both the state welfare department and the county defendants were entitled to a dismissal as a matter of law because the exhaustion of administrative remedies was a prerequisite to the trial court's jurisdiction.¹²⁹

C. Miscellaneous Cases Impacting Health Law — Statutory Interpretation Related to Group Homes

Within a six-month period, the Indiana Fourth District Court of Appeals decided two cases that presented the same issue regarding a 1988 amendment of the adult group home statute. The court in *Minder v. Martin Luther Home Foundation*¹³⁰ overruled the court's prior decision in *Clem v. Christole, Inc.*¹³¹ holding that the 1988 amendment of a statute authorizing the location of group homes for the developmentally disabled and mentally ill in a single family residential subdivisions constituted a valid retroactive exercise of the state's police power.¹³²

First, in *Clem*, property owners in a consolidated case, appealed judgments permitting developers to operate group homes for developmentally disabled persons in the residents' single family residential subdivision. The residents alleged that the location of group homes designed for the developmentally disabled violated subdivision restrictive covenants. While an appeal was pending, the Indiana General Assembly passed a law in 1989 which declared void as against public policy any restrictions against residential facilities for developmentally disabled or mentally ill persons.¹³³ This statute, in pertinent part, provides:

Sec. 14(a) This section applies to each restriction, reservation, condition, exception, or covenant that is created before April 1, 1988, in any subdivision plat, deed, or other instrument of, or pertaining to, the transfer, sale, lease, or use of property.

(b) A restriction, reservation, condition, exception, or covenant in a subdivision plat, deed, or other instrument of, or pertaining to, the transfer, sale, lease, or use of property that would permit the residential use of property but prohibit the use of that property as a residential facility as a residential facility for developmentally disabled or mentally ill persons:

- (1) on the ground that the residential facility is a business;
- (2) on the ground that the persons residing in the residential facility are not related; or

129. *Id.*

130. 558 N.E.2d 833 (Ind. Ct. App. 1990).

131. 548 N.E.2d 1180 (Ind. Ct. App. 1990).

132. *Minder*, 558 N.E.2d at 834-35.

133. IND. CODE § 16-13-21-14 (West Supp. 1990).

(3) For any other reason;
is, to the extent of the prohibition, void as against the public policy of the state.¹³⁴

In light of these amendments, the court ordered the case remanded to the trial court for further consideration as a matter of judicial economy.¹³⁵

The trial court vacated the former judgments and entered summary judgment for the developers, finding that the covenants were void against public policy pursuant to the statute. The subdivision residents appealed.¹³⁶

The Fourth District Court of Appeals reversed the trial court's decision, and held that the statutory amendment authorizing the location of group homes for developmentally disabled and mentally ill persons in single family residential subdivisions was not a valid retroactive exercise of the state's police power.¹³⁷ Further, the court held that the proposed group homes violated certain subdivision covenants, and that allowing occupation to occur or continue unabated would violate the residents' fifth amendment rights to just compensation.¹³⁸ The court affirmed that the legislature may neither impose unnecessary restrictions upon lawful occupations nor arbitrarily interfere with private rights.¹³⁹ Retroactive application of laws is only allowed under limited circumstances.¹⁴⁰

In *Minder*, subdivision residents brought an action for a declaratory judgment to prohibit, as a violation of restrictive covenants in their deeds, the presence of an adult group home in their subdivision. The trial court granted summary judgment in favor of the adult home, and the residents appealed. The appeals court sustained the trial court, thereby overruling its earlier decision in *Clem*.¹⁴¹

Judge Miller, the author of the court's majority opinion in *Minder*, quoted from his dissent in *Clem* in which he noted that the group homes did not violate the restrictive covenants contained in the respective deeds. He emphasized that there was no dispute that the group homes were the type of building (single family dwellings) permitted by the covenants. The uses of the group homes were residential and not the business uses prohibited by the covenants. Based on this argument, the constitutional issues raised in *Clem* were not significant, and even if they were, case

134. *Id.*

135. *Clem*, 548 N.E.2d at 1182.

136. *Id.* at 1182-83.

137. *Id.* at 1185.

138. *Id.* at 1185-86.

139. *Id.* at 1183-84.

140. *Id.* at 1187.

141. *Minder*, 558 N.E.2d at 835.

law mandated that the retroactive provision in the statute did not violate due process and did not unconstitutionally impair the residents' contracts because it was a legitimate and narrowly drawn exercise of the police power of the state.¹⁴²

The dissent in *Minder* argued that the restrictive covenants adopted when the subdivisions were created were valid and enforceable covenants limiting the areas to single family dwellings and residential purposes.¹⁴³ Commercial and business uses in the area were prohibited. The statute purports to declare all restrictions created prior to April 1, 1988 void to the extent that they prohibit the use of property as a residential facility for developmentally disabled or mentally ill persons.¹⁴⁴ The dissenting opinion quoted the Indiana State Constitution which expressly provides that "[n]o ex post facto law, or law impairing the obligation of contracts shall ever be passed."¹⁴⁵ Furthermore, the dissenting opinion reiterated that "the legislature may prohibit contracts that are against public policy, [but] it, nevertheless, may not impair previously legal contracts after the rights thereunder have vested."¹⁴⁶ It concluded that despite its salutary purposes, the 1989 statutory amendment violated the Indiana Constitution and therefore should not be permitted to stand.¹⁴⁷

II. LEGISLATIVE ENACTMENTS RELATED TO HEALTH CARE

A. AIDS Legislation

Effective March 20, 1990, Indiana Code section 16-1-10.5-20 was amended to include the protection of health care personnel and emergency medical personnel against persons who pose a threat to their health.¹⁴⁸ The amendment allows a court to order a health officer or law enforcement officer to take a person into custody and transport the person to an appropriate emergency care or treatment facility for observation, examination, testing, diagnosis, care, treatment, and, if necessary, temporary detention when such action is necessary to guard the health and safety of a health care professional.¹⁴⁹ As amended, the statute broadens the list of situations in which a court may order a person to be taken

142. *Minder*, 558 N.E.2d at 834.

143. *Id.* at 835.

144. IND. CODE § 16-13-21-14 (West Supp. 1990).

145. *Minder*, 558 N.E.2d at 835 (Gerrard, J., dissenting) quoting IND. CONST. art. 1 § 24.

146. *Id.* at 835 (Garrard, J., dissenting).

147. *Id.*

148. IND. CODE § 16-1-10-5-20 (West Supp. 1990).

149. *Id.*

into custody in order to determine whether the person poses a danger to the public health.¹⁵⁰

In 1990, the Indiana General Assembly also amended Indiana Code section 16-8-7.5 by adding a new section, 6.5, that requires the State Board of Health to adopt rules providing for testing for sexually transmitted diseases prior to permitting practitioners to perform artificial insemination procedures.¹⁵¹ This new law, which became effective July 1, 1990, directs the practitioner to perform an HIV test at least annually as long as artificial insemination procedures are continuing and not to perform artificial insemination unless the tests for the HIV antibody produce negative results. While the statute mandates that HIV testing be completed before a donation of semen may be used in artificial insemination, the statute removes the requirement for a number of bacterial and viral tests to be performed, thus bringing the statute in compliance with the American Fertility Society's guidelines.

B. Access to Health Records

During the survey period, the Indiana legislature enacted two significant amendments affecting the access to health records statute.

1. Access to Mental Health Records.—The Indiana General Assembly enacted House Enrolled Act 1170 concerning access to mental health records.¹⁵² This amendment, within the Access to Health Records law,¹⁵³ establishes a new procedure for access to mental health records effective July 1, 1990.

The amendment provides a definition of mental health and alcohol and drug abuse records that now includes "any recorded or unrecorded information concerning the diagnosis, treatment, or prognosis of a patient receiving mental health services or developmental disability training."¹⁵⁴ It delineates the procedure for access to mental health records by permitting the patient and certain individuals authorized by statute to obtain the record upon proper written request.¹⁵⁵ The statute stipulates what constitutes a proper written request and what the provider shall give the individual who makes a proper request.¹⁵⁶

A provision in the Act has been created that permits disclosure of mental health records without first requiring a patient's consent.¹⁵⁷ A

150. *Id.*

151. IND. CODE § 16-8-7.5 (West Supp. 1990).

152. 1990 Ind. Acts 119.

153. IND. CODE § 16-4-8 (1988).

154. *Id.* § 16-4-8-1.

155. *Id.* § 16-4-8-3.

156. *Id.* § 16-4-8-4.1.

157. *Id.* § 16-4-8-3.2.

dual hearing process has been established for persons seeking access to a patient's mental health records without the patient's consent.¹⁵⁸ This process permits the filing of a petition in court by one who has filed a lawsuit or is a party to a legal proceeding.¹⁵⁹ Importantly, a court order authorizing release of a patient's mental health records must:

(1) [l]imit the disclosure to those parts of the patient's record that are essential to fulfill the objective of the order; (2) [l]imit disclosure to those persons whose need for the information is the basis of the order; and (3) [i]nclude other measures necessary to limit disclosure for the protection of the patient, the provider-patient privilege, and the rehabilitative process.¹⁶⁰

If a patient's mental health records or testimony is offered or admitted in a legal proceeding, the court shall maintain the record or transcript of the testimony as a confidential court record.¹⁶¹

The apparent intent of this statute was to establish protection for mental health records comparable to that provided under federal law for alcohol and drug abuse records. This statute may, however, create confusion as to the extent of its application. For example, if a patient is admitted to a facility for nonmental health treatment and in the course of such treatment discloses that he or she is currently receiving mental health treatment services, and this fact is recorded in what would otherwise be considered a nonmental health record, the notation of this fact may render the health record a mental health record and require the provider to authorize its release pursuant to the mental health records provisions. The definition of mental health record, "information concerning the diagnosis, treatment or prognosis of a patient receiving mental health services," could be construed to mean that any mention of treatment for mental health services in a record converts that record within the definition of mental health record and subject to the provisions of the statute.

2. *Noncustodial Parent's Access to Child's Health Record.*—In 1990, the Indiana General Assembly also amended the access to health records law by including a provision granting noncustodial parents equal access to their children's health records effective July 1, 1990.¹⁶² This provision permits equal access to records unless a court has issued an order limiting the noncustodial parent's access and the health care provider has received a copy of the court order or has actual knowledge

158. *Id.* § 16-4-8-3.2

159. *Id.* § 16-4-8-3.2(c)(2).

160. *Id.* § 16-4-8-3.2(i).

161. *Id.* § 16-4-8-3.2(j).

162. *Id.* § 16-4-8-14.

of the court's order. Therefore, the provider is required to grant non-custodial parents the same access to their children's health records as the custodial parents so long as there is no court order or knowledge of such to the contrary and the party comports with statutory and provider requirements of written authorization, payment for copies, and related procedures. The statute also allows the provider to require the parent requesting equal access to the records to pay a fee to cover the cost of the additional expense of duplicative access.

Survey of Recent Developments in Insurance Law

JOHN C. TRIMBLE*

I. INTRODUCTION

The past year could be labeled the "practical" year in the area of insurance law. There were no particularly momentous decisions changing any long-standing principles of insurance. However, there were numerous opinions dealing with some of the practical, every-day problems that practitioners face in interpreting insurance contract situations. Although there were a number of interesting opinions,¹ this Article will focus upon the cases that are likely to arise most frequently in the general practice of law.

The cases reported in this Article will deal with: (1) the continuing development of Indiana law with respect to the "intentional act" exclusion; (2) selected statute of limitations issues; (3) automobile liability policy exclusions; (4) a new area of insurance agent liability; and (5) a discussion of some practical statutory changes enacted by the 1990 Indiana General Assembly.

II. INTENTIONAL ACTS EXCLUSION

During the survey period,² the Indiana Court of Appeals again dealt with the interpretation and effect of the standard "intentional act"

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1. There were a number of interesting cases that discussed or reaffirmed existing insurance law. See *State Farm Fire & Cas. Co. v. Miles*, 730 F. Supp. 1462 (S.D. Ind. 1990) (an insured's guilty plea to a criminal act is admissible, but not conclusive, on the issue of whether an insured acted intentionally); *Burleson v. Illinois Farmers Ins. Co.*, 725 F. Supp. 1489 (S.D. Ind. 1989) (an insurer should not be liable for consequential damages arising from a breach of the insurance contract if the insurer acted in good faith when it originally denied payment to its insured); *Westers v. Auto-Owners Ins. Co.*, 711 F. Supp. 946 (S.D. Ind. 1989) (insurer granted summary judgment on the issue of punitive damages only in a case in which coverage was denied because arson was suspected); *Aetna Cas. & Sur. Co. v. Crafton*, 551 N.E.2d 893 (Ind. Ct. App. 1990) and *Johnson v. Payne*, 549 N.E.2d 48 (Ind. Ct. App. 1990) (reaffirming that a "resident" of a household is determined by more than just the person's subjective statements of intent); *LeMaster Steel Erectors, Inc. v. Reliance Ins. Co.*, 546 N.E.2d 313 (Ind. Ct. App. 1989) (reaffirming that an insurer may not subrogate against another person who is an insured under the policy); *Martin v. Rivera*, 545 N.E.2d 32 (Ind. Ct. App. 1989), *trans. denied* (discussing the "passenger for hire" exclusion in an automobile policy).

2. Approximately June 1989 to Aug. 1, 1990.

exclusion. The case of *Allstate Insurance Co. v. Herman*³ is interesting because it shows just how difficult it can be in Indiana for an insurance company to prove that its insured acted intentionally when injuring another person. Although the facts of the case appear to indicate that the insured clearly acted intentionally, the Indiana Court of Appeals⁴ and the Indiana Supreme Court⁵ reached different conclusions about how to apply the intentional acts exclusion.

In *Herman*, the insured, Steven Heroy, and his wife got into a fight with a gang of twenty to thirty people in front of the Heroys' house.⁶ During the fight, Heroy suffered a head injury and dislocated his shoulder. When he noticed a member of the group striking Mrs. Heroy in the head with a baseball bat, he went into the house and procured his wife's .32 caliber revolver. Upon returning, he fired a shot into the air from his front porch, causing the group to begin running. He then chased the group and fired the four remaining shots in the direction of the fleeing people.⁷ One of the shots struck Charles Herman in the back. Herman and his father filed a civil liability action against Heroy. Allstate Insurance Company subsequently intervened in the lawsuit seeking a declaratory judgment on the question of whether Heroy's actions were intentional.⁸ The Allstate homeowner's insurance policy covering Heroy contained an intentional act exclusion which read: "We do not cover bodily injury or property damage intentionally caused by an insured person."⁹

The trial judge denied a motion for summary judgment filed by Allstate. Allstate then brought an interlocutory appeal to the Indiana Court of Appeals.¹⁰ The court of appeals first noted that the standard for interpreting the intentional act exclusion was established in the 1975 case of *Home Insurance Co. v. Neilsen*.¹¹ In *Neilsen*, the court held that a policy excluded coverage for any act of the insured in which the insured "intended to cause injury."¹² The intent could be proven by showing that the insured actually intended the injury or by showing that the nature and character of the insured's act was such that intent to harm the other party must be inferred as a matter of law.¹³

3. 551 N.E.2d 844 (Ind. 1990).

4. *Allstate Ins. Co. v. Herman*, 542 N.E.2d 576 (Ind. Ct. App. 1989), *vacated*, 551 N.E.2d 844 (Ind. 1990).

5. *Herman*, 551 N.E.2d 844 (Ind. 1990).

6. *Id.* at 844.

7. *Id.*

8. *Id.* at 844-45.

9. *Herman*, 542 N.E.2d at 577.

10. *Id.* at 576.

11. 165 Ind. App. 445, 332 N.E.2d 240 (1975).

12. *Id.* at 451, 332 N.E.2d at 244.

13. *Id.*

Following this interpretation, the Indiana Court of Appeals in *Herman* held that the trial judge was correct in denying the summary judgment.¹⁴ The court noted that Heroy had testified that he was confused and that he was "just aiming in the general direction of where they was at."¹⁵ The intermediate court did not believe that pointing a gun and firing it in the general direction of a crowd was sufficient proof, as a matter of law, to hold that Heroy acted intentionally.¹⁶

Upon transfer to the Indiana Supreme Court, the result was different. The court examined the evidence, and concluded that there was no question that Heroy deliberately emptied a revolver into a crowd of fleeing people.¹⁷ On that basis, the court held as a matter of law that Heroy acted intentionally when he fired into a crowd, and the court remanded the case for entry of summary judgment in favor of Allstate.¹⁸

The disagreement in this case between the court of appeals and the supreme court is somewhat troubling. Although the court of appeals correctly held that summary judgment should be denied when there is any genuine issue of material fact,¹⁹ its ruling appears to totally overlook the basic purpose of liability insurance. Liability insurance is designed to protect the insured from liability arising from accidents and other unforeseen occurrences. It was never designed to protect an insured who, in a fit of anger, fires a pistol in the direction of a fleeing crowd. Had the trial court and court of appeals properly considered this factor, the case never would have reached the Indiana Supreme Court.

III. STATUTE OF LIMITATIONS ISSUES

One of the more significant cases dealing with statute of limitations issues in the insurance context was *Sprowl v. Eddy*.²⁰ This case dealt with the very common situation in which a plaintiff's attorney is trying to settle with the tortfeasor's insurance carrier prior to filing suit. In such cases, it is not unusual for the negotiations to take place right up to the two-year statute of limitations for tort actions.²¹ *Sprowl* answers the question of what can happen when the plaintiff's attorney and the insurance carrier voluntarily agree to waive the statute of limitations so they can continue to negotiate a settlement without having filed suit.

14. 542 N.E.2d at 578.

15. *Id.*

16. *Id.*

17. *Herman*, 551 N.E.2d at 845.

18. *Id.* at 846.

19. *Herman*, 542 N.E.2d 576, 577.

20. 547 N.E.2d 865 (Ind. Ct. App. 1989).

21. IND. CODE § 34-1-2-2 (1981).

In *Sprowl*, the plaintiff, Mr. Eddy, allegedly suffered injuries in an automobile accident with Sprowl.²² Following the accident, Eddy's attorney began to negotiate settlement with Sprowl's insurer, Indiana Farmers Mutual.²³ Although communications were exchanged over several months, the case was not settled as the two-year statute of limitations deadline approached. Approximately one week before the deadline, Farmers wrote Eddy's attorney and agreed to waive the statute of limitations for approximately two months so the parties could discuss settlement.²⁴ Shortly before the two-month extension expired, Farmers again agreed to extend the statute of limitations a few extra days.²⁵

Near the end of the extension period, Eddy tendered a demand for settlement that exceeded Sprowl's insurance limits. When the demand was rejected, Eddy filed suit.²⁶ Thereafter, counsel was employed for Sprowl, and an answer was filed in which the statute of limitations was asserted as an affirmative defense. Eddy moved to strike the defense and Sprowl moved for summary judgment on the defense. After a hearing, the trial court denied Sprowl's motion for summary judgment and sustained Eddy's motion to strike. The issue presented on appeal was whether the trial court had ruled correctly.²⁷

There was no question before the court of appeals that the personal injury action had been filed after the two-year statute of limitations.²⁸ The main question, therefore, was whether Eddy had a right to believe that Farmers Mutual had the authority to waive the statute of limitations for its insured, Sprowl.²⁹ The court held that Eddy had the right to rely on Farmers's representation, and that Eddy did, in fact, rely to his detriment.³⁰ Therefore, the court agreed that there was a genuine issue of material fact, and that the trial court correctly denied Sprowl's motion for summary judgment.³¹ However, the court also found that the trial court had erred in granting Eddy's motion to strike because a question of fact also existed on the issue of estoppel.³²

The case is interesting not because of the appellate court's ruling, but because the court of appeals acknowledged that Eddy's settlement

22. 547 N.E.2d at 865.

23. *Id.*

24. *Id.*

25. *Id.* at 865-66.

26. *Id.* at 866.

27. *Id.*

28. *Id.*

29. *Id.* at 868.

30. *Id.*

31. *Id.*

32. *Id.*

demand exceeded Sprowl's insurance policy limits.³³ The court then addressed the question of whether Eddy could properly rely on Farmers's authority to extend the statute of limitations as to any exposure that Sprowl could have to Eddy in excess of Sprowl's insurance limits.³⁴ The court noted that Eddy should not have expected Farmers to be responsible for any more than Sprowl's policy limit and, therefore, Farmers's extension of the statute of limitations was only to the extent of Farmers's policy limit.³⁵ Sprowl could not be held to pay anything from his personal resources for any judgment in excess of the policy limit.³⁶

This case is important because it contains a fact scenario that is very common. For many reasons, plaintiffs' attorneys and insurers like to try to settle cases before suit. After *Sprowl*, plaintiffs' attorneys must now file suit to preserve the statute of limitations. Because plaintiffs' attorneys will not often know the tortfeasor's policy limit, and because they will usually not have much information about the tortfeasor's personal assets, they cannot risk limiting their recovery to the amount of the tortfeasor's liability limits. Instead of agreeing to extend the statute of limitations, counsel will now have to file suit and simply agree to extend the time period that the insurance company has to hire counsel to appear and defend the insured.

Two additional cases during the survey period addressed a statute of limitations question. In *Panos v. Perchez*³⁷ and *Lumpkins v. Grange Mutual Companies*,³⁸ the Indiana Court of Appeals addressed the question of how long an insured has to bring an action against his own insurer for uninsured motorist benefits. In each case, the insurer argued that the two-year period of limitations for personal injury actions should apply.³⁹ However, in both cases the court held that the ten-year statute of limitations for contract actions would govern.⁴⁰ The court reasoned that the insurance company's liability to the insured arose out of a right created by contract; therefore, the contract statute of limitations should apply.⁴¹ Although the court ruled that the longer statute of limitations is applicable, *Lumpkins* demonstrated that there is a trap for the unwary with respect to this issue. In *Lumpkins*, the Grange Mutual policy contained a provision in the uninsured motorist section that required

33. *Id.*

34. *Id.* at 868-69.

35. *Id.* at 868.

36. *Id.* at 869.

37. 546 N.E.2d 1253 (Ind. Ct. App. 1989).

38. 553 N.E.2d 871 (Ind. Ct. App. 1990).

39. See *Panos*, 546 N.E.2d at 1255; *Lumpkins*, 553 N.E.2d at 872.

40. See *Panos*, 546 N.E.2d at 1255; *Lumpkins*, 553 N.E.2d at 873.

41. See *Panos*, 546 N.E.2d at 1255; *Lumpkins*, 553 N.E.2d at 873.

the insured to bring any action against the company within the time period allotted by the applicable statute of limitations for bodily injury or death.⁴² In Indiana, that period of limitations is two years.⁴³

Lumpkins argued that the two-year limiting provision should not be followed unless the insurer could show that it had been prejudiced by the insured's failure to bring his action within the two-year statute of limitations period.⁴⁴ Lumpkins correctly pointed out that under Indiana law, policy provisions dealing with issues such as notice and cooperation do not bar recovery unless the insurer has been prejudiced as a result of delay or problems with cooperation.⁴⁵ The court of appeals disagreed.⁴⁶ It held that the purpose of a provision limiting the time to bring an action against the company was "to promote certainty and hasten the resolution of claims."⁴⁷ Therefore, the court stated that prejudice need not be shown.⁴⁸ The court concluded by stating that the time limitation can be waived by the insurer, but that the insurer did not have to show prejudice.⁴⁹ Therefore, the two-year provision in the policy was binding.⁵⁰

Lumpkins demonstrates very clearly that an attorney representing a client against an insurer *must read the policy*. Although most automobile policies are fairly standard, *Lumpkins* dealt with a policy provision that was not standard. Because his action was not commenced within two years after the date of the accident, Lumpkins was barred from recovery under his uninsured motorist coverage. Every attorney must learn from this case that the policy must be obtained from the insured and reviewed as the first step in proper representation.

IV. AUTOMOBILE LIABILITY POLICY EXCLUSIONS

Another noteworthy case from the survey period was *Safeco Insurance Co. of America v. State Farm Mutual Automobile Insurance Co.*⁵¹ In *Safeco*, the Indiana Court of Appeals determined the validity of a provision in an automobile liability policy excluding coverage to "any person under the age of twenty-five who is not a member of the named insured's family."⁵²

42. 553 N.E.2d at 873.

43. IND. CODE § 34-1-2-2(1) (1981).

44. *Lumpkins*, 553 N.E.2d at 874.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. 555 N.E.2d 523 (Ind. Ct. App. 1990).

52. *Id.* at 523.

The case arose when three young men were returning from a camping trip in an automobile owned by the father of one of them. The owner's son had entrusted the vehicle to one of his companions. Subsequently, the friend who was driving was involved in an accident, and was sued by the parties he injured. The issue was whether the friend driving the vehicle should be entitled to liability coverage under the owner's policy.⁵³

State Farm Mutual commenced the lawsuit in the form of a declaratory judgment action.⁵⁴ State Farm was the personal auto insurer of the young man who was driving,⁵⁵ and it contended that the owner's policy with Safeco Insurance should also defend the young man in the lawsuit arising from the accident.⁵⁶ However, Safeco contended that it did not owe him a defense because of the exclusion.⁵⁷

The trial judge determined that the exclusion in the Safeco policy was void as contrary to public policy.⁵⁸ Specifically, the judge found that the endorsement was in conflict with Indiana's compulsory insurance law.⁵⁹ That finding was challenged on appeal.

The Indiana Court of Appeals first discussed the nature of Indiana's financial responsibility law. The court noted that Indiana's law is not technically a compulsory insurance statute.⁶⁰ In reviewing Indiana Code section 27-1-13-7, the court noted that all Indiana casualty insurers must provide a policy containing a provision insuring the *owner* against liability for damages caused by death or injury to other persons resulting from the negligent operation of the owner's motor vehicle.⁶¹ However, the statute did not expressly require that a non-owner operator be covered by the policy. Instead, a separate financial responsibility statute⁶² permits non-owner operators to procure coverage through their own operator's policy.⁶³

Under the circumstances, the court found that Safeco technically had complied with the spirit of the statute because it was not required to provide coverage any broader than necessary to protect the *owner* of the vehicle.⁶⁴ Because the non-owner operator had the prerogative

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 524 (citing *American Underwriters Group v. Williamson*, 496 N.E.2d 807 (Ind. Ct. App. 1986)).

61. *Id.* (citing IND. CODE § 27-1-13-7 (1981)).

62. IND. CODE §§ 9-2-1-1 to -41 (1988).

63. *Safeco*, 555 N.E.2d at 524 (citing IND. CODE §§ 9-2-1-1 to -41 (1988)).

64. *Id.* at 524-25.

and the ability to obtain coverage through a separate source, Safeco's policy was not in contravention of Indiana law.⁶⁵ This case again demonstrates the fact that not every automobile policy in Indiana is standard. Companies have found that they can include limiting provisions in their policies to reduce their exposure. The exclusion in Safeco's policy is not one that an attorney would expect to see in a standard automobile policy. It simply underscores the need to study the policy language in every case because no two policies are exactly the same.

V. INSURANCE AGENT LIABILITY

In *Medtech Corp. v. Indiana Insurance Co.*,⁶⁶ the Indiana Court of Appeals decided a unique issue of insurance agent liability. The issue was whether an agent could be liable to an insured for mishandling the submission of a claim when the duty for claim processing was not specifically a part of the agent's responsibility to the company or to the insured.

In this case, Joe Ferree Agency, Inc. had procured a commercial insurance policy for Medtech and Biotechnic that covered the companies' inventory, equipment, and supplies, and also provided liability coverage.⁶⁷ Shortly after the coverage was procured, a building leased by the insured was undergoing roof repairs when rain came through the roof and caused substantial damage to the company's inventory, equipment, and supplies.⁶⁸

Initially, the insured's insurance agent prepared a property loss notice, and forwarded it to Indiana Insurance Company. The insurance agent promised the insureds that he had done everything necessary to preserve any claims that they might have under the policy.⁶⁹ However, the insureds originally did not want their own insurer to pay the claim because they believed that the roofing company's insurer would settle their losses.⁷⁰ Later, after negotiations with the roofer failed, the insureds turned to Indiana Insurance Company.⁷¹

Indiana Insurance Company denied the claim because the insureds did not file a sworn statement in proof of loss within sixty days of the incident, and did not bring their suit against Indiana Insurance Company within one year of the date of loss as required by the policy provisions.⁷²

65. *Id.*

66. 555 N.E.2d 844 (Ind. Ct. App. 1990).

67. *Id.* at 846.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

After being turned down by Indiana Insurance Company, the insureds turned to their agent for compensation. In their suit against the agency, they brought claims based upon promissory estoppel, actual or constructive fraud, and principles of agency.⁷³ The constructive fraud issue proved to be the most potent in favor of the insureds.

The court noted that the elements of constructive fraud are: "(1) a duty existing by virtue of the relationship between the parties; (2) representations or omissions made in violation of that duty; and (3) reliance on that representation or omission by the individuals to whom the duty is owed and to the detriment of that individual."⁷⁴ In addressing these issues, the court initially considered whether the agency had any legal or contractual duty to assist the insureds in processing the claim. The court also noted that even when taking on a duty gratuitously, the obligation arises to use reasonable skill, care, and diligence in carrying out the duty.⁷⁵

To counter the constructive fraud allegation, the insurance agency argued that the insureds had their own duty to learn the contents of their insurance policy, including the provisions relied upon by the insurer to deny coverage.⁷⁶ Interestingly, the court of appeals noted that "reasonable reliance upon an agent's representation can override an insured's duty to read his insurance policy."⁷⁷

Attorneys who represent insurance agents should take this case to heart. Attorneys should advise their clients to be very careful when counseling insurance customers in situations in which the customer wishes to make a claim against someone else's coverage, as opposed to presenting a claim under the customer's own coverage. This case illustrates that an insured can lose precious rights under an insurance policy by not complying with policy time limitations. An agent must emphasize to his or her insurance customer that these limitations must be remembered if the insured decides to delay making a claim with the insured's own carrier.

VI. STATUTORY DEVELOPMENTS

A. *Unfair Claim Settlement Practices*

In 1990, the Unfair Claim Settlement Practices Act⁷⁸ was considerably overhauled. Although there is still no common law cause of action based

73. *Id.*

74. *Id.* at 848-49.

75. *Id.* at 849.

76. *Id.* at 849-50.

77. *Id.* at 851.

78. IND. CODE §§ 27-4-1-1 to -18 (1988).

upon violation of the Act, the legislature put a great deal more teeth into the Act by substantially increasing the civil penalties against insurers for violation of the Act.⁷⁹ By the terms of the Act, all insurers are obligated to notify existing insureds of the remedies available to them under the Act.⁸⁰ Furthermore, the Act obligates the Insurance Commissioner of Indiana to publish figures annually indicating the ratio of valid consumer complaints lodged against each company in proportion to the direct premiums earned in Indiana by each company.⁸¹

B. Cancellation of Policies

During 1990, Indiana Code section 27-7-6-12 was added.⁸² The new section prohibits any insurer after June 30, 1990 from failing to renew, refusing to issue an automobile policy, or canceling a policy on the basis that a person is "disabled" as defined by 42 U.S.C. § 416.⁸³ Furthermore, no company may issue an automobile insurance policy to a disabled person under conditions less favorable than those offered to non-disabled persons.⁸⁴

C. Subrogation

There were two important amendments to subrogation statutes during 1990. The first amendment dealt with the handling of underinsured motorist subrogation. Under Indiana Code section 27-7-5-6, the legislature provided a solution to the frequently troubling question of how a person can settle for the underlying limit of a third party's insurance policy without waiving his own right to recover against his own insurer for underinsured motorist coverage.

The statute now provides that an insured may notify his underinsured motorist carrier that he has received a bona fide offer of settlement from an underinsured motorist for the underinsured motorist's limits.⁸⁵ The underinsured carrier is then obligated to advance to its insured an amount equal to the amount provided for in the settlement offer within thirty days after the underinsured carrier receives the notice.⁸⁶ If the carrier does not do so, the insured may settle with the underlying policy

79. *Id.* § 27-4-1-6(1) (Supp. 1990).

80. *Id.* § 27-4-1-5.5(d).

81. *Id.* § 27-4-1-19.

82. Act of Mar. 16, 1990, Pub. L. No. 121-1990, § 9, 1990 Ind. Acts 1956; Act of Mar. 20, 1990, Pub. L. No. 149-1990, § 4, 1990 Ind. Acts 2092.

83. IND. CODE § 27-7-6-12(a) (Supp. 1990).

84. *Id.* § 27-7-6-12(b).

85. *Id.* § 27-7-5-6(b).

86. *Id.*

holder, and all subrogation rights by the underinsured carrier are waived.⁸⁷ If, however, the underinsured carrier advances the payment, the underinsured carrier has full rights of subrogation, and literally steps into the shoes of its insured in pursuing the claim against the underinsured motorist.⁸⁸

Indiana Code section 27-7-5-6 also addressed the question of subrogation when an insurer pays uninsured motorist coverage or underinsured motorist coverage because of the insolvency of an insolvent insurer.⁸⁹ The statute indicates that the paying insurer has no right of subrogation against the insured of the insolvent insurer or against the Indiana Insurance Guaranty Association, except that the paying insurer may subrogate against the insolvent insurer's insured that portion of its payment that exceeds the liability limits of the insolvent insurer's policy.⁹⁰

Indiana Code section 34-4-33-12 was also amended in 1990. This section provides that a subrogation claim, or other lien or claim arising out of the payment of medical expenses or other insurance benefits, is diminished by the comparative fault of the insured or the uncollectibility of the full value of the insured's claim.⁹¹ The statute now has an additional section that requires the party holding the lien or claim to bear a pro rata share of the claimant's attorney's fees and litigation expenses.⁹² In other words, the insurer can no longer refuse to pay the plaintiff's attorney's fees for recovering the lien amount.

87. *Id.*

88. *Id.*

89. *Id.* § 27-7-5-6(c).

90. *Id.*

91. *Id.* § 34-4-33-12.

92. *Id.*

Survey of Recent Developments in Indiana Employment Law

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I. INTRODUCTION

Indiana employment law evolves continuously and, at times, unpredictably. Although this survey period (June 1989 to October 1990) did not provide Indiana employers and employment law practitioners with any single landmark issue, Indiana courts, the Unemployment Insurance Review Board of the Indiana Department of Employment and Training Services, and the state and federal legislatures continued the evolutionary process through several noteworthy decisions and pieces of legislation. This Article focuses on developments in: (1) the employment-at-will doctrine, (2) Indiana's unemployment compensation, wage payment, and child labor statutes, (3) public sector employment, and (4) handicap discrimination.

II. THE EMPLOYMENT-AT-WILL DOCTRINE: THE "PUBLIC POLICY" EXCEPTION FURTHER DEFINED

Although common-law exceptions to employment-at-will in Indiana remain limited, the Indiana Court of Appeals provided further definition to those exceptions during this survey period.

A. *Divergent Signals From The Court Of Appeals*

1. *Call v. Scott Brass, Inc.*—A careful reading of *Call v. Scott Brass, Inc.*¹ suggests that the Fourth District Court of Appeals dealt a solid blow to the "narrow" public policy exceptions created by the Indiana Supreme Court in *Frampton v. Central Indiana Gas Co.*² and *McClanahan v. Remington Freight Lines*.³ Call claimed that she was

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1. 553 N.E.2d 1225 (Ind. Ct. App. 1990).

2. 260 Ind. 249, 297 N.E.2d 425 (1973).

3. 517 N.E.2d 390 (Ind. 1988).

terminated from her position as Corporate Human Resource Manager for Scott Brass because she complied with a summons and appeared for jury duty. The Starke County Circuit Court granted Scott Brass's motion for summary judgment, holding that Indiana Code section 34-4-29-1⁴ provides the exclusive remedy for an employee discharged because she responded to a jury summons, and Call had not filed her claim within the statute's ninety-day limitation period.⁵

The Court of Appeals framed the issue as whether Indiana Code section 34-4-29-1 is the exclusive remedy for an at-will employee discharged for compliance with a summons to appear for jury service.⁶ To guide its course through the murky and often uncharted waters of Indiana's employment-at-will doctrine, the court proffered an oft-cited principle of statutory construction: "[W]hen the legislature enacts a statute which creates a right, which did not exist previously, and prescribes a remedy for the infringement of that right, the statutory remedy is exclusive."⁷ The court's mission was: Determine which came first, the 1987 enactment of section 34-4-29-1 or the common-law public policy exception to employment-at-will.⁸

In ruling that the public policy exception for employees discharged for refusing to violate a statutory duty predated the statutory enactment,⁹ the court rejected Scott Brass's arguments that the Indiana Supreme Court's 1973 *Frampton* decision was limited either to its specific facts (discharge for filing a worker's compensation claim)¹⁰ or, at most, to

4. IND. CODE § 34-4-29-1 (1990).

5. *Call*, 553 N.E.2d at 1226.

6. *Id.* at 1226, 1227. IND. CODE § 34-4-29-1 provides:

A person who is dismissed from employment [because the employee has received or responded to a summons, served as a juror, or attended court for prospective jury service] may bring a civil action, within ninety [90] days of the dismissal, against the employer who dismissed him:

- (1) To recover the wages he lost as a result of the dismissal; and
- (2) To obtain an order requiring reinstatement by the employer.

If the person obtains a judgment against the employer, the court shall award a reasonable attorney's fee to the person's attorney.

7. *Call*, 553 N.E.2d at 1227 (citing *Public Serv. Comm'n v. City of Indianapolis*, 235 Ind. 70, 131 N.E.2d 308 (1956); *City of Fort Wayne v. Bishop*, 228 Ind. 304, 92 N.E.2d 544 (1950); *Environmental Properties v. City of Fort Wayne*, 178 Ind. App. 645, 383 N.E.2d 481 (1978); *Richmond Power & Light v. Indiana & Michigan Elec. Co.*, 170 Ind. App. 458, 353 N.E.2d 467 (1976)).

8. *Id.*

9. *Id.* at 1229.

10. *Id.* at 1228. The court observed that no Indiana appellate court interpreting *Frampton* has restricted *Frampton* to worker's compensation claimants. In *Indiana Department of Highways v. Dixon*, 512 N.E.2d 1113 n.1 (Ind. Ct. App. 1987), the First District Court of Appeals noted that the supreme court's decision in *Morgan Drive Away*,

employees discharged for exercising a statutory right.¹¹ Thus, the court rejected the argument that a *separate* exception for refusing to violate a statutory duty did not exist until the Indiana Supreme Court's 1988 *McClanahan* decision.¹²

According to the court, *Frampton* created a broad public policy exception for employees discharged either for exercising a statutory right or for refusing to violate a statutory duty.¹³ The court deemed that discharge for complying with a jury summons fell within the broadly stated *Frampton* exception.¹⁴ Thus, the court held that the statutory remedy was not exclusive.¹⁵

The court did not stop there. It further held that even if the statute had preceded *Frampton*, it would not be inclined to consider the statute exclusive because Indiana Code section 34-4-29-1 does not specify its exclusivity, and the jury is an indispensable part of the justice system.¹⁶ The court's dicta is surprising, and unnecessary, given the ascribed unequivocal character of the "which came first" principle of statutory construction underlying the court's holding.

Scott Brass also argued that Call, who was eligible to seek redress under the statute, could not state a cause of action because the public policy exceptions to employment-at-will are limited to remediless plaintiffs.¹⁷ In a rather remarkable exercise of statutory interpretation, the court rejected this argument by concluding that because the statutory remedies in section 34-4-29-1 are not stated in the disjunctive and Call did not seek all of the remedies therein, Call had no statutory remedy.¹⁸

Once again the court saw fit to add questionable dicta to its holding. The court stated that neither *Frampton* nor *McClanahan* discussed whether the existence of an employee's cause of action depended upon the

Inc. v. Brant, 489 N.E.2d 933 (Ind. 1986) "appears to limit actions for retaliatory discharge to cases where the plaintiff was fired for seeking worker's compensation as in *Frampton*." See also Reeder-Baker v. Lincoln Nat'l Corp., 644 F. Supp. 983, 984-85 (N.D. Ind. 1986).

11. *Call*, 553 N.E.2d at 1228-29.

12. *Id.* at 1229. The court appears to ignore the Indiana Supreme Court's statement in *McClanahan* that "[a] *separate* but tightly defined exception to the employment at will doctrine is appropriate under these facts." *McClanahan*, 517 N.E.2d at 393 (emphasis added). However, prior to *McClanahan*, two Indiana federal district courts had recognized an exception to the at-will doctrine for an employee discharged for fulfilling a statutory duty. See *Sarratore v. Longview Van Corp.*, 2 Individual Empl. Rts. Cas. (BNA) 922 (N.D. Ind. 1987); *Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387 (S.D. Ind. 1982).

13. *Call*, 553 N.E.2d at 1229.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 1230.

employee's ability to obtain a statutory remedy.¹⁹ This pronouncement leads one to wonder whether the court read *Frampton* carefully.

In *Frampton*, the Indiana Supreme Court emphasized the dilemma in which an employee finds herself because of the threat of discharge for filing a worker's compensation claim.²⁰ Because of the fear of discharge, employees "will not file claims for justly deserved compensation — opting, instead, to continue their employment without incident."²¹ The court emphasized that "[o]nce an employee knows he is remediless if retaliatorily discharged, he is unlikely to file a claim."²² Without a cause of action for wrongful discharge, therefore, employers would be free to undermine the purpose of the worker's compensation statute.²³

In contrast, when plaintiffs have alternative remedies available, courts consistently have refused to recognize a cause of action for retaliatory discharge. In *Vantine v. Elkhart Brass Mfg. Co.*, the Federal District Court for the Northern District of Indiana held that *Frampton* should not apply when the existence of a collective bargaining agreement provides the plaintiff with a remedy for unjust discharge.²⁴ Likewise, in *Reeder-Baker v. Lincoln National Corp.*, the same court held that *Frampton* should not apply to a plaintiff alleging that she was fired for filing a discrimination charge with the Equal Employment Opportunity Commission.²⁵ The court stated, "[T]he *Frampton* exception to the at will doctrine was intended to protect an employee without a remedy."²⁶ Reeder-Baker had a statutory remedy: Title VII's retaliation provisions.²⁷

Most recently, in *Lawson v. Haven Hubbard Homes, Inc.*, the Fourth District Court of Appeals (the same court that decided *Call*) refused to extend *Frampton* to an employee on medical leave who was discharged for filing a claim for unemployment compensation.²⁸ The court reasoned that the employee would receive unemployment compensation benefits either way.²⁹ In other words, she was not without remedy.

Call's significance in the evolution of Indiana's employment-at-will doctrine may lie beyond its substantive holdings. In its closing remarks, the court clarified its approach to the application of the public policy

19. *Id.*

20. *Frampton*, 260 Ind. at 249, 297 N.E.2d at 425.

21. *Id.* at 251, 297 N.E.2d at 427.

22. *Id.* at 252, 297 N.E.2d at 428.

23. *Id.* at 251-52, 297 N.E.2d at 427.

24. 572 F. Supp. 636 (N.D. Ind. 1983), *aff'd*, 762 F.2d 511 (7th Cir. 1985).

25. 644 F. Supp. 983 (N.D. Ind. 1986).

26. *Id.* at 986.

27. 42 U.S.C. § 2000e-3 (1988).

28. 551 N.E.2d 855 (Ind. Ct. App. 1990).

29. *Id.* at 860.

exception to employment-at-will.³⁰ Given the opportunity, the Fourth District appears ready to erode further Indiana's employment-at-will doctrine.

2. *Lawson v. Haven Hubbard Homes, Inc.*—Two months prior to deciding *Call*, the same court decided *Lawson v. Haven Hubbard Homes, Inc.*³¹ Reading the majority opinions in *Call* and *Lawson* may lead one to question whether they were issued from the same court. While Judge Chezem's opinion in *Call* reflects a desire to be at the forefront of employment-at-will doctrine erosion, Judge Miller's majority opinion in *Lawson*, in which Judge Chezem dissented, is a refusal to expand *Frampton* to an unusual, but sympathetic, set of facts.

Lawson was injured on the job and was unable to work for several months, during which time she received worker's compensation benefits. On August 2, 1982, a doctor hired by Haven Hubbard's worker's compensation insurance carrier released Lawson to return to work without restriction. However, the chiropractor who treated Lawson indicated that Lawson should not lift objects weighing more than twenty-five pounds. Haven Hubbard refused to re-employ Lawson until she secured a release from the chiropractor. For several months, Lawson contacted Haven Hubbard in an attempt to return to work but was consistently advised that she could not return. During this time, she was maintained on medical leave of absence status. When Lawson filed for unemployment compensation benefits, Haven Hubbard terminated her employment. Lawson claimed that she had been discharged in retaliation for exercising a statutory right.³²

The St. Joseph County Circuit Court granted Haven Hubbard's motion for summary judgment, holding that the public policy exception to the employment-at-will doctrine announced in *Frampton* was specifically limited to employees discharged for filing worker's compensation claims.³³ Although the court of appeals acknowledged that the *Frampton* exception applied beyond the worker's compensation context, it refused to extend *Frampton* to the facts before it.³⁴ The court stated that the *Frampton* exception is limited to those situations in which the fear of discharge would have a deleterious effect upon the exercise of the

30. *Call*, 553 N.E.2d at 1230 ("Violation of state statutes will not be tolerated, in either criminal or civil forums. A violation of state public policy by employers, as expressed by the statutes enacted by the legislature, should carry with it attendant civil liability where it invades an employee's legally protected interests.").

31. 551 N.E.2d 855.

32. *Id.* at 856.

33. *Id.* at 857.

34. *Id.* at 859-60.

statutory right in question.³⁵ The court reasoned that an employee will not file an unemployment compensation claim unless he or she is unemployed or unless the employer is refusing to allow the employee to return to work. In either case, the employee will receive unemployment compensation benefits. The court opined that the fear of discharge has no effect on the exercise of the right to file for unemployment compensation.³⁶

3. *Bowlen v. ATR Coil Company, Inc.*—In *Bowlen v. ATR Coil Company, Inc.*,³⁷ the court readily dismissed the plaintiffs' wrongful discharge claim on federal preemption grounds. In *Bowlen*, supervisory workers alleged that they were discharged for engaging in union activity, and brought suit against ATR for wrongful discharge and intentional infliction of emotional distress. The supervisors claimed that their termination violated the express statutory public policy reflected in section 22-7-1-2 of the Indiana Code.³⁸

The Monroe Superior Court granted ATR's motion to dismiss; the First District Court of Appeals affirmed. Noting that federal labor law denies protection to supervisors discharged for union activity,³⁹ the court held that the alleged state statutory cause of action was preempted by federal labor law.⁴⁰ The supervisors' claim of intentional infliction of emotional distress failed because it was not supported by an underlying wrongful act.⁴¹

4. *Smith v. Electrical System Division of Bristol Corp.*—Most recently, the Third District Court of Appeals had an opportunity to provide onlookers with insight into its employment-at-will tendencies. Like the Fourth District in *Lawson*, the Third District was faced with an unusual and sympathetic set of facts in *Smith v. Electrical System Division of Bristol Corp.*⁴² In May 1986, Smith sustained a serious injury in an industrial accident. She applied for and received worker's compensation

35. *Id.* at 860.

36. *Id.*

37. 553 N.E.2d 1262 (Ind. Ct. App. 1990).

38. IND. CODE § 22-7-1-2 (1990). This section provides:

No worker or group of workers who have a legal residence in the state of Indiana shall be denied the right to select his or their bargaining representative in this state, or be denied the right to organize into a local union or association to exist within and pursuant to the laws of the state of Indiana

39. See National Labor Relations Act, 29 U.S.C. §§ 152(3), 152(11) (1988) (as amended). Sections 152(3) and 152(11) exclude supervisors from the definition of "employees" protected under § 7.

40. *Bowlen*, 553 N.E.2d at 1264.

41. *Id.* at 1265.

42. 557 N.E.2d 711 (Ind. Ct. App. 1990).

benefits. She was allowed a medical leave of absence until February 1989, when her employment was terminated pursuant to Bristol's absence control policy. The policy provided that a leave of absence for illness or injury could continue for one year or an amount of time equal to the employee's length of service, whichever was less. Smith brought suit against Bristol for wrongful discharge, alleging that her discharge had been in retaliation for her pursuit of worker's compensation benefits.

It was clear from her deposition testimony that Smith's was not the classic *Frampton* case it had initially appeared to be. Smith was not alleging that she was discharged *because* she filed for worker's compensation. Rather, Smith claimed that Bristol's absenteeism policy *indirectly* penalized the exercise of a statutory right. She contended that the absenteeism policy discouraged employees from applying for worker's compensation for fear of discharge. The St. Joseph Superior Court granted Bristol's motion for summary judgment; the Court of Appeals affirmed.⁴³

The court held that to come within either the *Frampton* or *McClanahan* exceptions to Indiana's employment-at-will doctrine, an employee must prove

that his or her discharge was *solely* in retaliation for the exercise of a statutory right or the fulfillment of a statutorily imposed duty. [citation omitted]. . . .

[A]bsent evidence of retaliatory intent, a neutral policy effecting an incidental detriment to an employee . . . [does not] constitute[] a violation of Indiana law.⁴⁴

Applying this principle to the facts before it, the court ruled that Smith had been penalized for excessive absences, a penalty that would have been incurred even if she had decided to take unpaid leave. As a result, her discharge had not been "*solely*" because of her exercise of a statutory right.⁴⁵

B. The Future Of The Employment-At-Will Doctrine

It is unlikely that the plaintiff bar's enthusiasm for chipping away at the employment-at-will doctrine will diminish during the next survey period. The divergent signals sent by the courts during the survey period and the willingness of at least one court to ignore the underlying rationale in *Frampton* and to add "the threat of common law suits in tort" to

43. *Id.* at 712.

44. *Id.* at 712-13 (emphasis added).

45. *Id.* at 713.

"the statutory remedy" provides encouragement for the plaintiff bar.⁴⁶ On the other hand, those who represent employers may need to steer more carefully as they navigate the waters of employment-at-will litigation, for the waters may prove more turbulent in the future.

III. HANDICAP DISCRIMINATION IN INDIANA

In May 1990, the Indiana Supreme Court examined an employer's obligations under the handicap discrimination provisions of the Indiana Civil Rights Law (the "Act").⁴⁷ In *Indiana Civil Rights Commission v. Southern Indiana Gas and Electric Co.*,⁴⁸ a five-feet one-inch tall, 124-pound female applied for the job of "meter man" with Southern Indiana Gas and Electric Co. ("SIGECO"). The position required heavy lifting. After the company physician examined the applicant and concluded that she had a congenital back disorder that made her "unfit for heavy work," SIGECO denied her employment.⁴⁹ The applicant's own physician confirmed the back disorder but concluded that it would cause her no more problems than a normal back.⁵⁰

The applicant filed a handicap discrimination charge with the Indiana Civil Rights Commission ("ICRC"), which determined that SIGECO had violated the statute. SIGECO appealed and the Pike County Circuit Court found in its favor. The ICRC appealed; the Fourth District Court of Appeals reversed the lower court.⁵¹ SIGECO appealed to the Indiana Supreme Court, which ruled in SIGECO's favor.

The Indiana Supreme Court concluded that both the ICRC and the court of appeals had ignored the Act's provision that handicap discrimination does not occur when an employer refuses to employ a person who, because of a handicap, is physically unable efficiently and safely to perform the duties required in the job.⁵² The court found that the applicant's small size, coupled with her back disorder, placed her in a category of persons whom SIGECO was well within its rights in finding could not efficiently and safely perform the duties required in the meter man position.⁵³

This case is significant to Indiana employers for two reasons. First, the Indiana Supreme Court has recognized a good faith defense to

46. See *Call v. Scott Brass, Inc.*, 553 N.E.2d 1225, 1230 (Ind. Ct. App. 1990).

47. IND. CODE §§ 22-9-1-3(q), -13 (1990).

48. 553 N.E.2d 840 (Ind. 1990).

49. *Id.* at 841.

50. *Id.*

51. *Id.*

52. IND. CODE § 22-9-1-13(a) (1990).

53. *Southern Ind. Gas and Elec. Co.*, 553 N.E.2d at 842.

allegations of handicap discrimination in screening prospective employees. The court stated:

If a physical examination engenders in a qualified expert's opinion an applicant for employment is physically unfit to perform the work required and the employer in good faith refuses to hire the applicant for that reason, the employer has a good defense to a later action, even though the initial expert's opinion is later proven wrong.⁵⁴

Second, the Indiana Supreme Court, in dicta, implicitly approved the lower court's conclusion that persons who are discriminated against because they are perceived as having handicaps are protected even if they, in fact, are not "handicapped."⁵⁵ Adopting the rationale of other state courts and federal law,⁵⁶ the court of appeals held that "persons who are discriminated against because they are perceived as having handicaps are protected by the Act."⁵⁷ This adoption extended Indiana's narrow statutory definition of a handicapped person.⁵⁸ The federal definition of a handicapped individual is significantly broader because it includes persons who had a handicap in the past as well as those individuals who do not have a handicap but are simply "regarded" as having a handicap as, for example, when an employer believes that an individual has AIDS simply because the employer knows the individual is a homosexual.⁵⁹

Indiana courts have had few occasions to interpret the Act's handicap discrimination provisions which are much narrower in scope than federal handicap discrimination law.⁶⁰ On July 26, 1990, the President signed

54. *Id.* at 843 (quoting with approval *Indiana Civil Rights Comm'n v. Southern Indiana Gas and Elec. Co.*, 544 N.E.2d 536, 542 (Ind. Ct. App. 1989) (Conover, J., dissenting)). The court of appeals had imposed "an affirmative duty upon employers, once the opinion of their medical expert is challenged, to double check, and correct when necessary, the decisions based on their medical expert's opinions." *Indiana Civil Rights Comm'n*, 544 N.E.2d at 541.

55. *Southern Ind. Gas and Elec. Co.*, 553 N.E.2d at 842.

56. Rehabilitation Act of 1973, 29 U.S.C. § 701-7961 (1988). The Rehabilitation Act prohibits employers who have federal contracts in excess of \$2,500, or who receive federal financial assistance, from discriminating against handicapped individuals. *Id.* § 793.

57. *Indiana Civil Rights Comm'n*, 544 N.E.2d at 539-40.

58. "'Handicap or handicapped' means the physical or mental condition of a person that constitutes a substantial disability [and] also means the physical or mental condition of a person that constitutes a substantial disability unrelated to the person's ability to engage in a particular occupation." IND. CODE § 22-9-1-3(q) (1988).

59. The Rehabilitation Act defines an "individual with handicaps" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B).

60. For example, Indiana's statute, unlike the Rehabilitation Act, does not require

into law the Americans With Disabilities Act of 1990 ("ADA").⁶¹ The ADA is likely to diminish further the impact of the state discrimination law because the ADA's protection of handicapped or disabled individuals is broader than that provided by Indiana law. With three exceptions,⁶² the ADA will eventually prohibit *all* employers with fifteen or more employees from discriminating against disabled individuals.⁶³ Therefore, it is unlikely that employees will seek relief under state law unless their employers are outside the coverage of the ADA.⁶⁴

Any attorney who counsels clients with respect to employment discrimination matters is well advised to become familiar with the provisions of the ADA. The ADA is frequently referred to as the most significant piece of civil rights legislation since the passage of the Civil Rights Act of 1964.⁶⁵ On the ADA's effective date, more than 40 million Americans with disabilities will come within its protections.

IV. INDIANA'S WAGE PAYMENT STATUTE

Indiana's wage payment statute mandates that employers pay "wages" semi-monthly and pay, within ten days, to an employee whose employment has terminated, all "wages" earned to the date of the termination.⁶⁶

Since its enactment, the wage payment statute has received little judicial interpretation. The most important case interpreting the statute

an employer to provide reasonable accommodation to handicapped individuals. *Compare* 41 C.F.R. § 60-741.2 (A "[q]ualified handicapped individual" means a handicapped individual . . . who is capable of performing a particular job, with reasonable accommodation to his or her handicap.") *with* IND. CODE §§ 22-9-1-13(b), (c) ("[T]he employer shall not be required . . . to promote or transfer such handicapped person to another job or occupation, unless, prior to such transfer, such handicapped person by training or experience is qualified This section shall not be construed to require any employer to modify any physical accommodations or administrative procedures to accommodate a handicapped person.").

61. Americans With Disabilities Act, 42 U.S.C. § 12101 (1990).

62. The ADA excludes from the definition of "employer" the United States government, a *bona fide* private membership club (other than a labor organization) exempt under § 501(c) of the INTERNAL REVENUE CODE of 1986, and Indian tribes. 42 U.S.C. § 12111(5)(B) (1990).

63. The ADA's employment discrimination provisions become effective July 26, 1992, for employers with 25 or more employees. After July 26, 1994, all employers with 15 or more employees are subject to the ADA. 42 U.S.C. § 12111(5)(A) (1990).

64. With three limited exceptions (not-for-profit organizations with exclusive fraternal or religious purposes, church-related institutions, and not-for-profit exclusively social organizations), the state statute covers employers with six or more employees within Indiana. IND. CODE § 22-9-1-3(h) (1988).

65. 42 U.S.C. § 2000e (1964).

66. IND. CODE §§ 22-2-5-1 to -3 (1990).

is *Die & Mold, Inc. v. Western*.⁶⁷ In *Die & Mold*, the court of appeals held that vacation pay is deferred compensation in lieu of wages and, absent a clear policy to the contrary, accrues as services are rendered. Upon termination, therefore, accrued vacation pay constitutes wages owed to the employee under the statute.⁶⁸ *Die & Mold* teaches Indiana employers who do not wish to pay terminated employees accrued vacation pay to include express language in their employee handbooks clearly indicating that (1) their vacation programs are intended only to compensate employees *during* the period spent on vacation; (2) unused vacation time is lost and may not be taken as compensation in lieu of time off; and (3) terminated employees will not be paid for any earned, but unused, vacation.

During the survey period, the First District Court of Appeals revisited the definitional breadth of the statutory term "wages."⁶⁹ In *Jeurissen v. Amisub, Inc.*,⁷⁰ two employees who quit their employment with Amisub in September claimed they were entitled to the incentive bonus that was tied to the employer's performance as of August 31. The court ruled that the amounts in question were a "bonus" which, in contrast to vacation pay, was not tied to regular work done on a periodic basis. As such, the court held that the incentive payments were not "wages" within the meaning of the statute.⁷¹

V. INDIANA'S UNEMPLOYMENT COMPENSATION STATUTE

Indiana's Employment Security Act⁷² provides that an unemployment compensation claimant is disqualified from receiving benefits if he or she voluntarily leaves his or her employment without good cause in connection with the work or is discharged for just cause.⁷³

67. 448 N.E.2d 44 (Ind. Ct. App. 1983).

68. *Id.* at 46-48.

69. IND. CODE § 22-2-5-1.

70. 554 N.E.2d 12 (Ind. Ct. App. 1990).

71. *Id.* at 13.

72. IND. CODE §§ 22-4-1-1 to -38-3 (1990).

73. "Discharge for just cause" is defined to include separation initiated by an employer for: (a) falsification of an employment application; (b) knowing violation of a reasonable and uniformly enforced rule; (c) unsatisfactory attendance, if the individual cannot show good cause for absences or tardiness; (d) damaging the employer's property through willful negligence; (e) refusing to obey instructions; (f) reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on the employer's premises during working hours; (g) conduct endangering the safety of the employee or his co-workers; (h) incarceration in jail following the conviction of a misdemeanor or felony by a court of competent jurisdiction; or (i) any breach of duty in connection with the work that is reasonably owed by the employee to the employer. IND. CODE § 22-4-15-1(d) (1988).

During the survey period, the court of appeals discovered that it is not always clear whether a claimant has quit or has been fired. Even when it is clear that the claimant terminated the employment voluntarily, an issue may arise as to whether or not the claimant left the employment for good cause. Also, the Unemployment Insurance Review Board of the Indiana Department of Employment and Training Services (the "Review Board") issued three significant survey period decisions addressing discharges related to drug testing.

A. Voluntary Terminations

In *Cheatem v. Review Board of the Indiana Department of Employment and Training Services*,⁷⁴ the claimant appealed the Review Board's determination that she be denied benefits because she voluntarily quit her employment. Cheatem was a retail store employee who was informed on a Wednesday afternoon that she was being placed on a three-day disciplinary suspension. Cheatem replied, "No, you might as well fire me,"⁷⁵ then departed her supervisor's office, clocked out, and left the store before the end of her shift. Later that afternoon, Cheatem telephoned her union steward to request a hearing on her suspension. The steward denied the request. The following Monday, Cheatem reported for work and was informed that she was no longer employed.⁷⁶

The Fourth District Court of Appeals held that Cheatem had been discharged. The court found no "manifestation of intent to quit" in Cheatem's actions. The court noted that Cheatem had not stated expressly that she was quitting and that in attempting to file a grievance over her suspension, she had evidenced that she did not intend to quit.⁷⁷

In *Thomas v. Review Board of the Department of Employment and Training Services*,⁷⁸ the claimant quit his job after being told by his employer that he would be fired if he filed a claim for unpaid overtime compensation with the Wage and Hour Division of the United States Department of Labor. The Review Board ruled that Thomas had quit without good cause.⁷⁹ The Second District Court of Appeals reversed the Review Board, holding that an employee has good cause voluntarily to leave his employment when his employer refuses to pay a statutorily mandated wage after the employee's demand.⁸⁰

74. 553 N.E.2d 888 (Ind. Ct. App. 1990).

75. *Id.* at 890.

76. *Id.* at 892.

77. *Id.*

78. 543 N.E.2d 397 (Ind. Ct. App. 1989).

79. *Id.* at 399.

80. *Id.* at 399-400.

B. *Just Cause Discharge*

One noteworthy judicial decision directly involving just cause discharge was rendered during the survey period. Additionally, as noted, the Review Board issued three important decisions addressing workplace drug testing.

1. *Court Looks to the Stated Reason for Discharge.*—In *Burnett v. Department of Employment and Training Services*,⁸¹ the Second District Court of Appeals reaffirmed that the Review Board and unemployment hearing referees are permitted to consider only whether the *stated* grounds for discharge have a basis in fact and constitute just cause. Reasons for discharge that are not communicated to the employee at the time of termination may not be relied upon as a basis for discharge in an unemployment compensation proceeding.⁸²

2. *The Review Board's Drug Testing Cases.*—In three survey period decisions,⁸³ the Review Board addressed the right to unemployment compensation benefits of employees discharged for failing a drug test. These cases are significant because many employers are implementing drug testing policies to comply with obligations under federal law⁸⁴ or as part of a voluntary effort to maintain a drug-free workplace.⁸⁵

81. 550 N.E.2d 78 (Ind. Ct. App. 1990).

82. *Id.* at 80-81 (citing *Voss v. Review Bd. Dep't of Employment and Training Serv.*, 533 N.E.2d 1020 (Ind. Ct. App. 1989)).

83. Review Board decisions are unpublished. Copies of the written decisions referenced herein do not reveal either party's name. When available, citation is made to the Review Board's case number. These decisions are on file in the *Indiana Law Review* office.

84. *See, e.g.*, Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 (1988); Department of Transportation Drug Testing Regulations, 49 C.F.R. pt. 40 (1989); Federal Highway Administration Regulations, 49 C.F.R. pt. 219 (1989); Federal Railway Administration Regulations, 49 C.F.R. § 391.81 (1989); Coast Guard Regulations, 46 C.F.R. pt. 16 (1989); Urban Mass Transit Workers Regulations, 49 C.F.R. pt. 653 (1989); Research and Special Programs Administration Regulations (pipeline and liquified natural gas facilities), 49 C.F.R. pt. 199 (1989).

85. A poll of 500 Indiana workers conducted by the Gallop Organization in March 1990 revealed the following:

- (1) While on the job, one in ten of the workers have been offered illegal drugs;
- (2) 42% of the workers have "personally seen or heard" that their co-workers have used drugs either before or after work while 32% report knowledge of on-the-job use; and
- (3) 97% of the workers favor some type of workplace drug testing; 25% believe drug testing "is a necessity"; 31% think drug testing should be permitted in limited circumstances; only three percent believe drug testing "is not needed."

Daily Labor Report (BNA), No. 135, July 13, 1990, A-1.

In Case No. 1,⁸⁶ the employer had a work rule requiring a drug test when an employee sustained a work-related injury. An employee who suffered an on-the-job injury tested positive for cocaine. In Case No. 2,⁸⁷ an employee who used marijuana during her off-duty time away from the employer's premises tested positive in a random drug test. In Case No. 3,⁸⁸ the employer suspected that an employee was using drugs based on a tip from another employee and the employee's low productivity. The employee tested positive. The Review Board's assignment in these cases was to determine the scope of the Employment Security Act's benefit disqualification provisions in the context of drug testing. The result was a charted path for employers to follow in implementing and enforcing drug testing policies.

a. The relevant disqualifications

Relevant provisions of the Indiana Employment Security Act provide that unemployment compensation benefits may be denied a claimant discharged for (1) reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on the employer's premises during working hours; (2) knowingly violating a reasonable and uniformly enforced rule of the employer; and (3) breaching a duty in connection with work that is reasonably owed the employer by the employee.⁸⁹

A positive test result alone, however, does not establish that an employee was "under the influence" for purposes of the first benefit disqualification.⁹⁰ "Under the influence" means "when one has an impaired condition of thought and action and, to a marked degree, the loss of the normal control of one's faculties."⁹¹ In the absence of proof of impairment, the employer must establish violation of a uniformly enforced and reasonable work rule or breach of a duty owed to the employer.

Regardless of which benefit disqualification the employer seeks to take advantage, the employer must show that the level of drug detected in an employee's system is sufficiently job-related to constitute "just

86. Review Board Case No. (89-A-10233) 89-R-1639 (June 20, 1990) (hereinafter referred to in text as "Case No. 1").

87. Review Board Case No. (89-A-7855) 89-R-1265 (Sept. 12, 1990) (hereinafter referred to in text as "Case No. 2").

88. Review Board Case No. (90-A-3968) 90-R-615 (June 20, 1990) (hereinafter referred to in text as "Case No. 3").

89. IND. CODE § 22-4-15-1(d) (1982).

90. Review Bd. Case No. (89-A-7855) 89-R-1265, at 3 (citing *Blake v. Hercules, Inc.*, 356 S.E.2d 453 (Va. Ct. App. 1987)).

91. *Alcoa v. Review Bd. of Ind. Empl. Sec. Div.*, 426 N.E.2d 54, 60 (Ind. Ct. App. 1981).

cause for discharge.”⁹² For this purpose, the Review Board has adopted the cutoff standards established by the United States Department of Transportation for determining whether an employee is “under the influence” of an illegal drug.⁹³

Under the second benefit disqualification, the employer must show not only uniform enforcement of the work rule but must show that the work rule is “reasonable.”⁹⁴ Thus, the employer must demonstrate that, under the circumstances, testing was appropriate. The Review Board has approved the following circumstances: (1) post-accident testing; (2) testing supported by a “reasonable suspicion” of an employee being under the influence or of on-premise use of intoxicants or illegal drugs; (3) follow-up testing of an employee after release from a treatment program; (4) testing required by state or federal law; or (5) random testing in safety or security sensitive jobs.⁹⁵

b. Evidentiary guidelines

To secure admission into evidence of the result of a drug test, an employer must satisfy certain evidentiary requirements set forth by the Review Board. The employer must produce the following documentary evidence:

- (1) A document signed by the tested employee indicating his or her consent to the test and release of the test results;
- (2) A document signed by the tested employee acknowledging that his or her specimen has been taken and sealed;
- (3) A document signed by the witness to the taking of the specimen, the sealing of the specimen, and the forwarding of the specimen in the chain of custody to the laboratory;
- (4) A certificate executed by the laboratory certifying that the specimen has been received with the chain of custody intact and that the chain of custody has been maintained at the laboratory;
- (5) Certification by the laboratory of the test results, together with the documentation of the tests and the cutoff value level for each test; and

92. Review Bd. Case No. (89-A-10233) 89-R-1639, at 3.

93. Department of Transportation's Procedures for Transportation Workplace Drug Testing Programs, 49 C.F.R. § 40.29 (1989).

94. IND. CODE § 22-4-15-1(d) (1982).

95. Review Bd. Case No. (89-A-7855) 89-R-1265, at 4.

- (6) Evidence that a positive test was confirmed using gas chromatography/mass spectrometry techniques.⁹⁶

c. Applying the rules to the fact patterns

In Case No. 1, the Review Board denied the claimant benefits. The employer's work rule that required employees to submit to a drug test after a job-related injury was deemed reasonable and uniformly enforced; the employer used the Department of Transportation cutoff levels and conducted a confirming test; and the employer satisfied the evidentiary requirements.⁹⁷

In Case No. 2, the Review Board refused to withhold benefits. The Review Board framed the issue as whether an employer may prohibit off-duty use of illegal drugs and enforce a drug policy through random drug testing.⁹⁸ To discharge an employee for off-duty drug use, an employer likely will need to demonstrate that by using illegal drugs off-duty the employee "breach[ed a] duty in connection with work which is reasonably owed an employer by an employee."⁹⁹ To meet this burden, the employer must show that the claimant was aware that the mere presence of illegal drugs in his or her system could result in discharge and that the employee was performing a "high risk" job.¹⁰⁰

Regarding an employer's ability to base a discharge decision on a random drug test, the Review Board held that the employer must show that the selection procedure is scientifically valid and creates an equal chance of selection for any employee and that the claimant held a "safety sensitive" or "security sensitive" position.¹⁰¹ With respect to employees in nonsecurity or nonsafety sensitive positions, discipline short of discharge should be imposed with follow-up testing.¹⁰²

The Review Board specifically noted that if an employer offers chemical dependency evaluation, counseling, or treatment, just cause for discharge will exist if the employee fails to avail himself or herself of the proffered assistance or fails to follow up on treatment.¹⁰³

In Case No. 3, the Review Board refused to withhold benefits because the hearing referee had failed to require the employer to produce evidence relating to the chain of custody of the claimant's specimen.¹⁰⁴

96. Review Bd. Case No. (89-A-10233) 89-R-1639, at 2; Review Bd. Case No. (90-A-3968) 90-R-615, at 2.

97. Review Bd. Case No. (89-A-10233) 89-R-1639, at 3.

98. Review Bd. Case No. (89-A-7855) 89-R-1265, at 2.

99. IND. CODE § 22-4-15-1(d)(8) (1982).

100. *Id.* Review Bd. Case No. (89-A-7755) 89-R-1265, at 2.

101. Review Bd. Case No. (89-A-7855) 89-R-1265, at 5.

102. *Id.*

103. *Id.*

104. Review Bd. Case No. (90-A-3968) 90-R-615, at 2-3.

The Review Board's decisions illuminate the importance of well-conceived and uniformly enforced drug testing policies. The precedent created by the Review Board's rulings technically is limited to the context of an unemployment compensation claim. However, the guidelines set forth therein have practical implications for employers whose drug-test-based decisions, and drug testing policies generally, may be scrutinized for "fairness" by *any* third party — be it an arbitrator, an administrative agency, a court, or the employees themselves.

VI. PUBLIC EMPLOYMENT IN INDIANA

During the survey period, the right of state and local government employees to bargain collectively over the terms and conditions of their employment was the subject of much legislative debate and media attention.¹⁰⁵ Ultimately, however, no collective bargaining legislation passed, and Governor Evan Bayh, by executive order, agreed to extend union recognition to state employees only.¹⁰⁶ Employment rights of public employees also were at issue in several survey period decisions of both the court of appeals and the supreme court.

A. *McDermott v. Bicanic*

In *McDermott v. Bicanic*,¹⁰⁷ a former administrator of parks and recreation for the City of Hammond brought a section 1983 action,¹⁰⁸ claiming he was fired for political reasons in violation of his first amendment rights. The Lake County Circuit Court denied the defendants' motion for summary judgment, and they appealed.

The Third District Court of Appeals applied the governing principle

105. Unlike their private sector counterparts, public employees have no federally based right to bargain collectively with their employers. Absent a state statute or local ordinance mandating collective bargaining with a majority representative, the state or municipality may refuse to recognize and bargain with a union. In 1975, the Indiana General Assembly passed public employee collective bargaining legislation. IND. CODE § 22-6-4-1 (1976), *repealed by* 1982 Ind. Act 3, § 1. However, in 1976, the Benton County Circuit Court held the statute unconstitutional and enjoined further proceedings under it. *Benton Community School Corp. v. Indiana Educ. Empl. Relations Bd.*, No. C75-141 (Benton Cir. Ct. Feb. 4, 1976). The Indiana Supreme Court agreed that the statute was unconstitutional. *Indiana Educ. Empl. Relations Bd. v. Benton Community School Corp.*, 266 Ind. 491, 365 N.E.2d 752 (1977). Indiana teachers maintain bargaining rights under an entirely different statute. IND. CODE § 20-7.5-1-1 (1973).

106. Exec. Order No. 90-6, 13 Ind. Reg. 10 (July 1, 1990).

107. 550 N.E.2d 93 (Ind. Ct. App. 1990).

108. The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988). Section 1983 provides a federal cause of action for any person whose constitutional or statutory rights have been violated by any person acting under color of State law.

that a nonpolicy-making, nonconfidential public employee cannot be fired upon the sole ground of political beliefs; but a policy-making or confidential employee may be fired on political grounds without violating the first amendment.¹⁰⁹ The court determined that:

The ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position, rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.¹¹⁰

The court found that Bicanic prepared budgets for his department, interviewed candidates for employment, recommended individuals for hire, and negotiated and signed contracts and leases. Given such responsibilities and duties, the court deemed that Bicanic was a policy-making employee.¹¹¹ As such, his discharge for political reasons was upheld. The court stated:

Those the people elect are entitled to employ others who hold their confidence; they must do so if they are to carry out the programs they promised to pursue. Bicanic wanted both to exercise discretionary powers of government and to be insulated from politics. Such an approach would put the First Amendment athwart the ability of the people to have their way through elections.¹¹²

B. City of Hammond v. Rossi

*City of Hammond v. Rossi*¹¹³ arose when John Rossi, a fire fighter with the City of Hammond, was electrocuted during a training activity. Katherine A. Rossi ("Rossi"), the fire fighter's widow and administratrix of his estate, filed suit under the Indiana Tort Claims Act ("TCA")¹¹⁴ against the City and other defendants. Prior to trial, Rossi entered into a covenant not to sue and a structured settlement with all defendants except the City. Rossi argued that the City was negligent and violated her husband's employment contract by failing to provide a safe working environment. The City pleaded the affirmative defenses of contributory negligence, assumption of risk, and the fellow servant rule.

109. *McDermott*, 550 N.E.2d at 94 (citing *Branti v. Finkel*, 445 U.S. 507 (1980)).

110. *Id.*

111. *Id.*

112. *Id.*

113. 540 N.E.2d 105 (Ind. Ct. App. 1989).

114. IND. CODE §§ 34-4-16.5-1 to -16.8-2 (1988).

The trial court granted Rossi's motion to strike the City's affirmative defenses pursuant to Indiana's Employer's Liability Act ("ELA").¹¹⁵ Moreover, the trial court rejected the City's argument that the ELA did not apply, and accepted Rossi's tendered jury instruction stating that the ELA abrogated the City's common-law defenses to wrongful death. Finally, the trial court concluded that the ELA's liability limit of \$10,000¹¹⁶ had been superseded by the \$300,000 limit of the TCA.¹¹⁷ The \$937,995 jury verdict was set off by the amount paid to Rossi under the settlement with the other defendants. The verdict was further reduced to the TCA's \$300,000 limit. Both Rossi and the City appealed.¹¹⁸

The court of appeals rejected Rossi's argument that the ELA's damages provision had been superseded by the damages provision of the TCA, and limited the City's liability to \$10,000.¹¹⁹ However, the court was careful to note that it did not need to decide whether the ELA was applied properly to the case because Rossi tendered the instruction based on the ELA.¹²⁰ Thus, even if the ELA did not apply, Rossi invited the error. The court cited *City of South Bend v. Rozwarski*,¹²¹ another case involving a wrongful death claim against a city by a fire fighter's estate in which the court avoided addressing the issue of the applicability of the ELA because neither party challenged the trial court's ruling that the ELA did not apply.

Given the court of appeals' dicta in *Rossi* and *Rozwarski*, at most, municipalities can conclude that if the ELA is applicable, its damages provision has not been superseded by the TCA's damages provision. Whether the ELA is applicable when a fire fighter's estate seeks damages against a city for the fire fighter's death remains unsettled.

Rossi makes clear, however, that set-offs will be made against the verdict, not the judgment.¹²² Therefore, a plaintiff's settlement with other parties will not benefit a city when the jury's verdict exceeds the statutory limit (under whichever applicable statute) by an amount greater than the settlement.

C. *Speckman v. City of Indianapolis*

In *Speckman v. City of Indianapolis*,¹²³ an Indianapolis Department of Parks and Recreation employee who had been discharged in December

115. *Id.* § 22-3-9-1 (1990).

116. *Id.* § 22-3-9-6.

117. *Id.* § 34-4-16.5-4 (1988).

118. *Rossi*, 540 N.E.2d at 105-06.

119. *Id.* at 108.

120. *Id.* at n.4.

121. 404 N.E.2d 19 (Ind. Ct. App. 1980).

122. *Rossi*, 540 N.E.2d at 108-09.

123. 540 N.E.2d 1189 (Ind. 1989).

1979 executed a settlement agreement with the City in 1981 under which he agreed to release the City from liability for all claims of wrongful discharge in exchange for the City's agreement to reinstate him, pay damages and accrued leave time, and treat him in accord with the City's personnel manual which required just cause for disciplinary action. In February 1982, Speckman was summarily discharged for alleged unlawful or negligent handling of public monies. After Speckman's second discharge, City employees made statements to the press indicating that Speckman had been dishonest or even criminal in handling funds.¹²⁴

Speckman filed a wrongful discharge claim against the City alleging that his discharge was contrary to public policy and in breach of his written employment contract. He further alleged that the City had denied him due process by violating a property interest in continued employment and violating a liberty interest in his good name and reputation by failing to provide a pre-termination hearing. The trial court granted the City's motion to dismiss, and Speckman appealed. The court of appeals ordered each count reinstated.¹²⁵ The City petitioned for transfer, which the supreme court granted.

The supreme court held that Speckman could be terminated only for just cause because Speckman's agreement to release all claims of wrongful discharge against the City constituted sufficient independent consideration to create an employment contract, and the City had agreed to treat Speckman in accord with its personnel manual, which required just cause for discharge. Thus, Speckman's claim for breach of contract was sufficient to avoid dismissal.¹²⁶

The Indiana Supreme Court also held that the trial court must be allowed to determine whether Speckman's particular contract created a legitimate entitlement to continued employment¹²⁷ and whether the alleged defamation foreclosed him from continuing in the same occupation and damaged his standing in the community.¹²⁸ The court noted that an employee need not establish the existence of a property or liberty interest to be entitled to a hearing on a due process claim; rather, the employee need only raise a genuine issue as to his interest in continued employment.¹²⁹

The supreme court observed that if the City could show that the process given to Speckman was adequate under the circumstances, then his two due process claims would be obviated.¹³⁰

124. *Id.* at 1190.

125. *Id.* at 1191.

126. *Id.* at 1192.

127. *Id.* at 1193.

128. *Id.* at 1193-94.

129. *Id.*

130. *Id.* at 1195.

The message of *Speckman* is three-fold. First, a settlement agreement under which a former City employee agrees to release the City from tort liability in exchange for reinstatement constitutes sufficient independent consideration to elevate an employment relationship from one terminable at-will to one terminable only for cause. Second, the same settlement agreement can give rise to a legitimate entitlement to continued employment (that is, a property interest) thereby requiring a pre-termination hearing. Third, alleged defamatory public comments may give rise to a liberty interest requiring a pre-termination hearing if there is a showing of sufficient damage to one's future employment opportunities and reputation.

D. Indiana Department of Highways v. Dixon

Finally, in *Indiana Department of Highways v. Dixon*,¹³¹ an off-duty maintenance worker for the Indiana Department of Highways ("IDOH") told a summer employee that IDOH supervisors had implied that the summer employee would not be hired for a possible job opening because he had filed a race discrimination claim against IDOH. IDOH determined that Dixon's action violated a work rule proscribing verbal abuse of supervisors, and discharged him in accordance with its progressive discipline procedure.¹³²

Dixon filed a written complaint with the IDOH complaint board, which heard evidence on Dixon's dismissal, determined that his statements were harmful to IDOH, and upheld his discharge. Dixon's appeal of the board's decision to the IDOH director was denied. Subsequently, Dixon filed a petition for judicial review¹³³ under the Administrative Adjudication Act ("AAA").¹³⁴

The trial court found that IDOH dismissed Dixon for making off-duty statements regarding matters of public concern that are protected by the first amendment. After concluding that IDOH failed to carry its burden of showing that Dixon's statements caused actual harm to IDOH, the trial court ordered reinstatement and a hearing to determine appropriate back pay.¹³⁵

131. 541 N.E.2d 877 (Ind. 1989) (Dickson and Pivarnik, JJ., dissenting). Justices Dickson and Pivarnik dissented on three grounds: (1) the applicability of Indiana's Administrative Adjudication Act to an at-will employee, (2) the timeliness of Dixon's filing, and (3) waiver for failure to raise the constitutional claim in the petition for review. *Id.*

132. *Id.* at 878.

133. *Id.* at 879.

134. IND. CODE § 4-22-1-14(b) (1984), *repealed by* 1986 Ind. Acts 18, § 2 (effective July 1, 1987), and *replaced by* IND. CODE § 4-21.5-1-1 (1986).

135. *Dixon*, 541 N.E.2d at 879.

The court of appeals reversed the trial court on the ground that it lacked subject matter jurisdiction. The court reasoned that since Dixon was an at-will employee, he was not entitled to judicial review under the AAA.¹³⁶

The supreme court disagreed, citing the prior AAA¹³⁷ for the proposition that any party aggrieved by an agency action shall be entitled to judicial review.¹³⁸ Moreover, the supreme court held that when the legislature intends to preclude judicial review of a constitutional claim, its intent must be clear and that under Indiana law, there is a constitutional right to judicial review of an administrative action.¹³⁹ In addition, the supreme court rejected IDOH's argument that Dixon's petition for judicial review was untimely, holding that *actual* receipt of notice of agency action is necessary before the fifteen-day period for filing a review petition commences. Here, the agency complied with all the requirements for giving notice, and someone accepted the notice at the plaintiff's last known address.¹⁴⁰

With regard to Dixon's first amendment claim, the Indiana Supreme Court held that the State may not fire or discipline an employee for making statements if: the employee is speaking on a matter of public concern;¹⁴¹ the balance between the employee's interest as a citizen in commenting upon matters of public concern and the State's interest as an employer in running an efficient operation weighs in the employee's favor;¹⁴² and the employee's speech is a motivating factor in the State's firing decision.¹⁴³ The court further emphasized that Dixon's statements were protected, even though they may have been false, unless the statements were knowingly or recklessly false and actual and significant harm resulted from the comments.¹⁴⁴

The court also rejected IDOH's argument that Dixon waived his first amendment claim by failing to raise it before the agency or spe-

136. *Id.*

137. IND. CODE § 4-22-1-14(b) (1984).

138. *Dixon*, 541 N.E.2d at 880.

139. *Id.*

140. *Id.*

141. The court held that race discrimination is a matter of public concern. *Id.* at 881.

142. The court held that IDOH failed to show any actual harm, noting that the State cannot base a discharge on possible bad effects or potential harm, and opined that a purely private statement on a matter of public concern will rarely, if ever, justify the discharge of a public employee. *Id.*

143. Dixon's speech was undisputably the motivating factor behind his termination. *Id.* at 878-79.

144. *Id.* at 882.

cifically to allege it in his petition for review because IDOH suffered no prejudice as a result of Dixon's failure.¹⁴⁵

The fact that this is a 3-2 decision and the fact that the at-will employee here had a constitutional claim should be kept in mind in subsequent cases in which at-will employees who do not have constitutional claims seek judicial review of their employers' discharge decisions.

VII. LEGISLATIVE DEVELOPMENTS

A. *Child Labor*

The survey period saw a heightened interest in child labor laws at both the state and federal levels. At the federal level, a child labor task force of the United States Department of Labor embarked on a nationwide sweep of small businesses uncovering numerous violations of federal child labor prohibitions.¹⁴⁶

At the same time, the 1990 session of the Indiana General Assembly expanded Indiana's limitations on the employment of children to cover seventeen-year-olds.¹⁴⁷ Under prior legislation, only children under the age of seventeen were protected.

B. *Statutory Minimum Wage*

On November 17, 1989, Congress enacted the Fair Labor Standards Amendments of 1989.¹⁴⁸ The amendments change certain provisions of the Fair Labor Standards Act ("FLSA") with respect to coverage, exemptions, and tip credits.¹⁴⁹ In addition, the FLSA minimum wage increased from \$3.35 per hour to \$3.80 per hour as of April 1, 1990, and to \$4.25 per hour as of April 1, 1991.¹⁵⁰ Employers may pay a training wage, under certain conditions, of at least eighty-five percent of the minimum wage, for up to ninety days, to employees under age twenty.¹⁵¹

The 1990 session of the Indiana General Assembly raised Indiana's minimum wage effective July 1, 1990, from \$2.00 per hour to \$3.35 per hour.¹⁵² Only employers with two or more employees who are not

145. *Id.*

146. Fair Labor Standards Act of 1938, 29 U.S.C. § 212 (1988) (as amended).

147. IND. CODE ANN. §§ 20-8.1-4-1, -2, -18, -20, -21.5, -23 (Burns Supp. 1990).

148. 29 U.S.C.A. § 201 (West Supp. 1990).

149. *Id.*

150. *Id.* § 206.

151. *Id.*

152. IND. CODE ANN. § 22-2-2-4(b) (Burns Supp. 1990).

subject to the FLSA are covered by Indiana's Minimum Wage Law.¹⁵³

VIII. CONCLUSION

Although the survey period did not yield a state decision or legislative change that is likely to have a substantial impact on the daily lives of Indiana's manufacturing, sales, service, and construction workers and their employers, the passage of the ADA, developments in workplace drug testing, and the continuous evolution of the employment-at-will doctrine will certainly affect the terms and conditions under which employees and employers interact. Therefore, developments in these specific areas should remain in focus during the next survey period.

Because employment law is a dynamic practice area, however, practitioners must not become myopic. Significant employment law developments occur literally on a daily basis. Because many of the daily changes occur at the administrative agency level where decisions and determinations are not published, and few of which are appealed, review of decisions published in the state reporters will rarely provide sufficient notice of trends that are developing in employment law. To navigate successfully the turbulent waters of the employment practice, practitioners must keep abreast of developments on the state and federal level, in administrative and judicial forums and in the legislature.

153. *Id.*

Recent Developments in Workers' Compensation

RUTH C. VANCE*

I. INTRODUCTION

During the last year, workers' compensation has received considerable attention from the courts, the legislature, and the governor's office. The court of appeals issued a controversial decision barring common law claims for sexual harassment under the exclusive remedy provision. Indiana joined the majority of states that make some statutory provision for vocational rehabilitation, by adding a new chapter to the Workers' Compensation Act. In addition, Governor Bayh determined that Indiana's workers' compensation system is in need of reform, and he appointed a task force to make recommendations to the legislature. This Article will review the previous year's major court decisions and legislation, and outline the legislative recommendations of the task force.

II. CASE LAW

A. *The Exclusivity Provision*

Because Title VII of the Civil Rights Act of 1964 does not allow compensatory or punitive damages to victims of sexual harassment,¹ plaintiffs have looked to alternative claims that, if successful, could provide compensatory and punitive damages for the emotional distress that sexual harassment may cause. Sexual harassment claims may be categorized as either nonphysical sexual discrimination and harassment or physical sexual assault. Alternative claims in the tort areas of assault and battery, invasion of privacy, defamation, interference with an advantageous business relationship, and intentional infliction of emotional distress have been advanced in different jurisdictions with varying success in the face of the exclusivity provision of state workers' compensation acts. The Indiana Court of Appeals recently has held that

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1. 42 U.S.C. §§ 1981 to 2000h-6 (1988).

the exclusivity provision of the Indiana Workers' Compensation Act bars actions for both sexual harassment and sexual assault.²

In *Fields v. Cummins Employees Federal Credit Union*,³ Sue Fields brought an action against both her employer and her supervisor, alleging sexual harassment, assault and battery, intentional infliction of emotional distress, interference with an advantageous business relationship, and negligent retention by the employer. Fields alleged that her supervisor at the credit union told her that he would give her a better performance review if she would go to bed with him, requested repeatedly that she go to bed with him, and stated repeatedly that Fields would be promoted if she would sleep with him. She also alleged that he often touched her on her back, buttocks, and shoulders, and attempted to kiss her. The employer and the supervisor argued that Fields's sole remedy was under the Workers' Compensation Act, and that her tort claims against both her employer and her supervisor were barred by the exclusive remedy provision. The defendants also argued that Title VII and the Indiana Civil Rights Act pre-empted Fields's cause of action. The trial court accepted the defendants' arguments and granted them summary judgment.

On appeal, the Indiana Court of Appeals held that Title VII and the Indiana Civil Rights Act did not pre-empt Fields's cause of action.⁴ The appellate court agreed with the trial court that Fields's tort claims against her employer were barred by the exclusive remedy provision of the Workers' Compensation Act, and the court affirmed the award of summary judgment to the employer.⁵ However, the court reversed the summary judgment granted in favor of the supervisor, finding that Fields's tort claims against her supervisor were not barred by the exclusive remedy provision.⁶

The court examined the facts and determined that the three statutory jurisdictional prerequisites were met: "(1) personal injury or death by accident; (2) personal injury or death arising out of employment; and (3) personal injury or death arising in the course of employment."⁷ The Indiana Supreme Court, in *Evans v. Yankeetown Dock Corp.*,⁸

2. *Arrow Uniform Rental, Inc. v. Suter*, 545 N.E.2d 832, 833 (Ind. Ct. App. 1989); *Fields v. Cummins Employees Fed. Credit Union*, 540 N.E.2d 631, 636 (Ind. Ct. App. 1989).

3. 540 N.E.2d 631.

4. *Id.* at 639-40.

5. *Id.* at 637.

6. *Id.* at 638.

7. *Id.* at 634-35.

8. *Id.* at 633 (citing *Evans v. Yankeetown Dock Corp.*, 491 N.E.2d 969 (Ind. 1986)).

had held that these three elements, which the Workers' Compensation Board uses to determine if there is workers' compensation coverage, should also be used by courts to determine if they have jurisdiction over the plaintiff's lawsuit.⁹ If all three prerequisites are met, the exclusive remedy provision of the Workers' Compensation Act precludes any other rights or remedies that an employee might have against her employer for personal injury or death.¹⁰

Although Fields admitted that the events complained of happened in the course of her employment, she argued that her injuries were not accidental and did not arise out of her employment. Fields asserted that an injury would have to result from a single event to be accidental. The court rejected Fields's argument, and relied on *Hansen v. Von Duprin, Inc.*,¹¹ in which a supervisor caused a worker mental injuries by repeatedly playing jokes on the worker that took advantage of her fear of guns. The *Fields* court found no distinction between the repeated practical jokes in *Hansen* and the repeated sexual harassment in Fields's situation, and thus found that Fields's injuries were "by accident."¹²

The court of appeals also found that the "personal injury or death arising out of employment" prerequisite was met.¹³ The court stated that "[a]n accident arises out of employment if it has its origin in a risk connected with that employment and flowed as a rational consequence from the employment."¹⁴ The court then proceeded to find a causal nexus between the supervisor's acts and Fields's employment.¹⁵ The court reasoned, much as the supreme court did in *Evans*,¹⁶ that Fields's tort claims were based on an employment relationship existing between herself and Cummins.¹⁷ The court stated that Fields therefore could not rely on the causal connection between her injuries and her employment relationship in the tort claim and also deny that the

9. *Id.* (citing *Evans*, 491 N.E.2d at 973).

10. *Id.* at 633-34.

11. *Id.* at 634 (citing *Hansen v. VonDuprin, Inc.*, 507 N.E.2d 573 (Ind. 1987)).

12. *Id.* at 635.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Evans* was a wrongful death action brought by Evans's personal representative against Evans's employer after an insane coworker shot and killed Evans while he was drinking coffee on the employer's premises right before the start of the shift. 491 N.E.2d 969, 970 (Ind. 1986). The court held that the wrongful death action was barred by the exclusive remedy provision of the Workers' Compensation Act because the claim was based on the existence of the employment relationship and a causal connection between the death and the employment. *Id.* at 976. In other words, Evans's death arose out of his employment. *Id.*

17. *Fields*, 540 N.E.2d at 635.

connection existed for purposes of overcoming the exclusive remedy provision of the Workers' Compensation Act.¹⁸ The court of appeals further found unpersuasive Fields's argument that her employer was responsible under the doctrine of respondeat superior for the acts of her supervisor. The court reasoned that because the supervisor acted on his own initiative and not in the service of his employer, his acts were outside the scope of his employment, and the doctrine of respondeat superior did not apply.¹⁹

In considering Fields's tort claims against her supervisor, the court of appeals found it necessary to go beyond the three jurisdictional prerequisites to determine if the supervisor could also invoke the exclusive remedy provision. The court relied on *Martin v. Powell*,²⁰ which found that a coemployee could be immune from suit under the exclusive remedy provision only if the coemployee was acting in the course of employment when the plaintiff suffered compensable injuries.²¹ The *Fields* court found that the supervisor's alleged acts could not have been for the employer's benefit.²² Therefore, the supervisor's acts were not within the scope of his employment and did not arise out of his employment.²³ Consequently, the court of appeals allowed Fields to proceed with her tort claims against her supervisor.

The court of appeals found that the fact that Fields's employer did not pay any medical bills or benefits under the Workers' Compensation Act was irrelevant.²⁴ Rather, it found that the only relevant inquiry was whether the three statutory jurisdictional prerequisites were present.²⁵ The court's statement indicates that the use of the same three statutory elements to determine jurisdiction and compensability is problematic. The problem in a sexual harassment situation is that the court can determine that the Workers' Compensation Board has exclusive jurisdiction, but the Board can later decide that the sexual harassment claim is not compensable under the Workers' Compensation Act. In a sexual harassment situation, benefits likely would not be payable because medical attention is unnecessary and earning capacity would

18. *Id.*

19. *Id.* at 636.

20. *Id.* at 637-38 (citing *Martin v. Powell*, 477 N.E.2d 943 (Ind. Ct. App. 1985)).

21. *Id.* at 637 (citing *Martin*, 477 N.E.2d at 945). The court in *Martin* held that the injured worker could sue her coemployee for injuries she received when he pulled a chair out from under her at work, because during that act of horseplay, he was not acting within the course of his employment. *Martin*, 477 N.E.2d at 945. The *Martin* court seems to have used the term "course of employment" as "scope of employment" is used.

22. *Fields*, 540 N.E.2d at 638.

23. *Id.*

24. *Id.* at 637.

25. *Id.*

not be lost. It seems odd to bar a tort action by holding that workers' compensation is the plaintiff's sole remedy when, in fact, workers' compensation affords the plaintiff no remedy.

Also during this survey period, the Indiana Court of Appeals barred an action for physical sexual assault and battery, and held that workers' compensation afforded the plaintiff her only remedy.²⁶ In *Arrow Uniform Rental, Inc. v. Suter*,²⁷ the plaintiff alleged that she was sexually assaulted and battered by three coemployees during a Christmas party held on the employer's premises during regular work hours. Following the precedent set in *Fields*, the court found that the injury happened by accident because the assault and battery were unexpected.²⁸ Relying on the reasoning in *Fields*, the court held that the injury arose out of the employment and occurred in the course of employment.²⁹ In this case, the manager was not involved in the alleged assault and battery, and therefore enjoyed the same immunity under the exclusive remedy provision as the employer.

The coverage of workers with mental injuries caused by mental stimulus at the workplace may provide the rationale for using the exclusive remedy provision to bar tort claims for sexual harassment.³⁰ Many types of workplace stress also can be the basis of harassment or discrimination claims. Accordingly, the possibility of overlap between workers' compensation stress claims and tort claims is great. For example, in addition to the usual three-part analysis that most states use to determine whether an injury is compensable under a workers' compensation act, the Wyoming Supreme Court determined in a sexual harassment suit alleging assault and battery and intentional infliction of emotional distress that the mental injury resulting from the harassment was compensable under the Workers' Compensation Act.³¹ Although not mentioned by the Indiana Court of Appeals, a factor leading to the decision to bar the plaintiff's sexual harassment tort claims may have been the compensability of mental injuries caused by mental stimulus.³² Courts that have held that the exclusive remedy

26. *Arrow Uniform Rental, Inc. v. Suter*, 545 N.E.2d 832, 833 (Ind. Ct. App. 1989).

27. 545 N.E.2d 832.

28. *Id.* at 833.

29. *Id.*

30. See D. DeCARLO & M. MINKOWITZ, *WORKERS COMPENSATION INSURANCE AND LAW PRACTICE* 289-90 (1989).

31. *Baker v. Wendy's of Montana, Inc.*, 687 P.2d 885 (Wyo. 1984) (the court decided that the statutory definition of "injury" included mental injury; therefore, the mental injuries suffered by these victims of sexual harassment would be compensable under the Workers' Compensation Act, and their tort claims were barred).

32. *Hansen v. VonDuprin, Inc.*, 507 N.E.2d 573, 576 (Ind. 1987).

provision does not bar sexual harassment tort claims against the employer generally have relied on the strong public policy against sexual harassment in the workplace evidenced by Title VII of the Civil Rights Act of 1964 and various state civil rights laws.³³

Fields may not foreclose all lawsuits for sexual harassment in the workplace. A suit for sexual harassment against the employer may be brought if the alleged acts were intentional and performed or directed by the employer or its alter ego.³⁴ In *National Can Corp. v. Jovanovich*,³⁵ a machinist with a serious back injury alleged that his employer intentionally assigned him heavy labor, despite the employer's knowledge of the back injury, because the employer resented the machinist's filing of grievances and wanted the machinist to resign. Although the court held that the machinist's action failed because he did not prove that the employer had the specific intent to harm him, the court implied that, given the right set of facts, an intentional tort exception to the exclusive remedy provision may be available.³⁶ The court stated that "it would be a total perversion of the humanitarian purposes of the Act to permit an employer to use the Act as a shelter against liability for an intentional tort."³⁷ The court also stated that "[i]t must be shown that the actor was the employer, one acting pursuant to employer's direct order or one acting as the alter ego of the corporation."³⁸ The court in *Fields* did not address this narrow exception expressed in *National Can*; therefore, this exception still appears to be available.

During the 1990 spring session of the Indiana General Assembly, House Bill 1085,³⁹ coauthored by Representative Robert E. Hayes (D-

33. See *Ford v. Revlon, Inc.*, 153 Ariz. 38, 734 P.2d 580 (1987); *Hart v. National Mortgage & Land Co.*, 189 Cal. App. 3d 1420, 235 Cal. Rptr. 68 (1987); *Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So. 2d 1099 (Fla. 1989); *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 501 A.2d 505 (1985); *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116 (1986); *Palmer v. Bi-Mart Co.*, 92 Or. App. 470, 758 P.2d 888 (1988).

34. *Shelby v. Truck & Bus Group Div. of Gen. Motors Corp.*, 533 N.E.2d 1296 (Ind. Ct. App. 1989); *National Can Corp. v. Jovanovich*, 503 N.E.2d 1224 (Ind. Ct. App. 1987).

35. 503 N.E.2d 1224.

36. *Id.* at 1234.

37. *Id.* at 1232.

38. *Id.* at 1233 n.13.

39. The House Bill reads as follows:

SECTION 1. IC 22-3-2-6 IS AMENDED TO READ AS FOLLOWS:

Sec. 6. The rights and remedies granted to an employee subject to IC 22-3-2 through IC 22-3-6 on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account

Columbus) and Representative John Thomas (R-Brazil), was introduced to provide additional remedies for employees alleging sexual or racial harassment. This bill would have amended the exclusive remedy provision to provide an exception for claims of sexual or racial harassment. The bill was later amended so that employers may be found liable for sexual or racial harassment only if they participated or acquiesced in the harassment through the conduct of their supervisory or management personnel.⁴⁰ The amended bill passed the House on the third reading. House Bill 1085 received a complete overhaul in the Senate and in the conference committee.⁴¹ The conferees agreed on what was essentially

of such injury or death, except for:

- (1) remedies available under IC 16-7-3.6; or
- (2) statutory or common law remedies available to an employee alleging sexual or racial harassment that occurs in the course of the employee's employment.

H.B. 1085, 106th Ind. Gen. Assembly, 2d Sess. (1990) (version considered by the House Judiciary Committee).

40. The bill provides the following:

SECTION 1. IC 22-3-2-6 IS AMENDED TO READ AS FOLLOWS:

Sec. 6. The rights and remedies granted to an employee subject to IC 22-3-2 through IC 22-3-6 on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death, except for:

- (1) remedies available under IC 16-7-3.6; or
- (2) statutory or common law remedies available to an employee alleging sexual or racial harassment that occurs in the course of the employee's employment.

Employers shall only be held liable for torts related to sexual or racial harassment if the employer participated in, encouraged, condoned or ratified such tortious conduct through the actions or inactions of its supervisory or management personnel.

H.B. 1085, 106th Ind. Gen. Assembly, 2d Sess. (1990) (version passed by the House).

41. The House Bill reads as follows:

SECTION 1. IC 22-9-1-6 IS AMENDED TO READ AS FOLLOWS:

. . . .

(m) If, upon all the evidence, the commission finds a person has engaged in sexual or racial harassment in violation of this chapter, the commission shall cause to be served on the person an order requiring:

- (1) the person to cease and desist from the unlawful harassment; and
- (2) the person to pay the complainant not more than three hundred percent (300%) of the wages, salary, or commissions the complainant earned, or would have earned had the complainant been working, for each day after notice of the complaint was given, but not to exceed one (1) year, if the commission finds that the complainant notified the person, the commission, or a local commission established by ordinance under section 12.1 of this chapter in writing of the unlawful harassment; and
- (3) the person to take further affirmative action as will effectuate the

a civil rights bill that imposed potential liability of three times what the complainant would have earned had the complainant been working each day after notice of the complaint was given.⁴² The maximum amount imposed would have been the complainant's earnings for one year.⁴³ Before it could be voted on by the full House and Senate, the bill went to the House Rules Committee for approval; it died in the

purposes of this chapter, including the following:

(A) To restore the complainant's losses incurred as a result of the unlawful harassment, as the commission may consider necessary to assure justice, but is limited to wages, salary, or commissions.

(B) To require the posting of notice setting forth the public policy of Indiana concerning civil rights and the respondent's compliance with the policy in places of public accommodations.

(C) To require proof of compliance to be filed by the respondent at periodic intervals.

(D) To require a person who has been found to be in violation of this chapter and who is licensed by a state agency authorized to grant a license to show cause to the licensing agency why the person's license should not be revoked or suspended.

SECTION 2. IC 22-9-1-6.1 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS:

Sec. 6.1. (a) If the commission:

(1) fails to make a determination on a complaint of sexual or racial harassment in violation of this chapter within one hundred eighty (180) days after receiving the complaint; or

(2) finds within one hundred eighty (180) days no probable cause to believe that a person has engaged in sexual or racial harassment in violation of this chapter; the complainant may bring a civil cause of action for the sexual or racial harassment alleged in the complaint filed with the commission.

(b) If subsection (a) applies, the commission shall issue a right to sue letter to the complainant upon the request of the complainant.

(c) A civil cause of action under subsection (a) must be filed not later than ninety (90) days after:

(1) the date of issuance of the right to sue letter by the commission if subsection (a)(1) applies; or

(2) the date of receipt by the complainant of the commission's finding that no probable cause exists to believe that a person has engaged in sexual or racial harassment if subsection (a)(2) applies.

(d) A complainant bringing a successful civil action under subsection (a) is entitled to reasonable attorney's fees.

(e) In a civil action under subsection (a), a complainant is limited to the same remedies that may be ordered by the commission under section 6 of this chapter.

Amended Engrossed H.B. 1085, 106th Ind. Gen. Assembly, 2d Sess. (1990) (unanimously approved conference committee report version that died in the House Rules Committee).

42. See text of House Bill 1085, *supra* note 41.

43. *Id.*

committee.⁴⁴ Practitioners should watch for additional "anti-Fields" bills in the next session of the General Assembly.

B. Retaliatory Discharge In Workers' Compensation Cases

In 1973, the Indiana Supreme Court started a national trend by finding a public policy exception to the firmly entrenched employment-at-will doctrine in the area of workers' compensation. The employment-at-will doctrine provides that an employer may terminate an employee's employment for any reason or no reason at all.⁴⁵ The court carved out an exception to the doctrine by holding that firing an employee for exercising the statutory right to file a workers' compensation claim violated public policy.⁴⁶ Following Indiana's lead, several other states have recognized a cause of action for retaliatory discharge when an employee is fired for filing a workers' compensation claim.⁴⁷ Although other states have created more exceptions to the employment-at-will doctrine,⁴⁸ Indiana courts have narrowly construed the public policy exception created in *Frampton v. Central Indiana Gas Co.*⁴⁹

During the last year, the Indiana Court of Appeals has continued to narrowly interpret the public policy exception to the employment-at-will doctrine enunciated in *Frampton*.⁵⁰ In *Peru Daily Tribune v.*

44. *Id.*

45. See generally Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

46. *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 252-53, 297 N.E.2d 425, 428 (1973).

47. See, e.g., *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976).

48. See *Duldulao v. Saint Mary of Nazareth Hosp. Center*, 115 Ill. 2d 482, 505 N.E.2d 314 (1987) (employee handbook created a binding contract, taking employee out of at-will employment); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (employee fired for informing police of coemployee's criminal activities had action for retaliatory discharge), *appeal denied*, 140 Ill. App. 3d 857, 489 N.E.2d 474 (1986); *Russ v. Pension Consultants Co.*, 182 Ill. App. 3d 769, 538 N.E.2d 693 (1989) (employee fired for refusing to engage in illegal conduct had action for retaliatory discharge); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (employee fired for serving on jury had action for retaliatory discharge).

49. 260 Ind. 249, 297 N.E.2d 425 (1973). After *Frampton*, the Indiana Supreme Court has recognized only two other public policy exceptions to the employment-at-will doctrine. See *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390 (Ind. 1988) (an exception to employment-at-will recognized when an employee is terminated for refusing to violate the law); *Romack v. Public Serv. Co.*, 511 N.E.2d 1024 (Ind. 1987) (an exception to employment-at-will recognized when after negotiations an employee relinquishes lifetime employment with one employer so that the employee can take what has been represented as lifetime employment with another employer).

50. See *Smith v. Electrical Sys. Div. of Bristol Corp.*, 557 N.E.2d 711 (Ind. Ct. App. 1990); *Peru Daily Tribune v. Shuler*, 544 N.E.2d 560 (Ind. Ct. App. 1989).

Shuler,⁵¹ Toni Shuler, a part-time newspaper sales representative, fell and hurt her knee at work. The day that Ms. Shuler informed her supervisor that she needed surgery on her knee, he terminated her employment. The supervisor's only reason for terminating Ms. Shuler was that he could not afford to have a salesperson absent. No evidence of unsatisfactory job performance existed. The Indiana Court of Appeals held that sufficient evidence supported the trial court's decision that Shuler had been discharged in retaliation for filing a workers' compensation claim.⁵² The court followed the reasoning in *Frampton* that a public policy exception to the general employment-at-will rule exists if the employee is terminated for exercising a statutorily conferred right, in this case, the right to file a workers' compensation claim.⁵³

Later in the year, the Indiana Court of Appeals in *Smith v. Electrical System Division of Bristol Corp.* declined to extend the rule established in *Frampton* to cover a situation in which a recipient of workers' compensation benefits was fired because the medical leave was longer than the leave allowed by the company's absence control policy.⁵⁴ The court distinguished *Smith* from *Frampton* by noting that the employer in *Smith* did not take retaliatory action when the worker applied for workers' compensation benefits.⁵⁵ The court found that the absence control policy was a neutral policy that did not violate the law because it created only an incidental detriment to an injured worker.⁵⁶

The court also considered whether the absence control policy violated Indiana Code section 22-3-2-15, which prohibits an employer from using any device to avoid obligations under the Workers' Compensation Act.⁵⁷ The court reasoned that the workers' compensation benefits paid by an employer are economic benefits, and that the benefit of indefinitely maintaining an injured worker's employment status is non-economic.⁵⁸ The court concluded that an employer is not obligated to provide this non-economic benefit under the Act, and therefore the absence control policy did not violate the statute.⁵⁹ Although the exception created in *Frampton* is still alive and well, *Smith* indicates that the Indiana Court of Appeals is not ready to expand *Frampton*.

51. 544 N.E.2d 560 (Ind. Ct. App. 1989).

52. *Id.* at 564.

53. *Id.* at 563.

54. *Smith*, 557 N.E.2d at 712-13.

55. *Id.* at 713.

56. *Id.* at 712-13.

57. *Id.* at 713.

58. *Id.*

59. *Id.*

C. Mental Stimulus - Mental Injury Accidents

In contrast to the narrow approach that the Indiana Court of Appeals has taken in creating exceptions to the employment-at-will doctrine, Indiana courts have liberally granted workers' compensation coverage to employees who suffer mental injuries brought about by mental stimuli. In 1987, the Indiana Supreme Court ruled that the same standard should be used in both mental and physical injury cases to determine if the injury arose out of the employment.⁶⁰ In *Hansen v. Von Duprin*, the court found that the employee could recover workers' compensation for mental injury caused when her supervisor intentionally preyed on her fear of guns by repeatedly harassing her with such acts as firing a cap gun and jabbing her in the ribs from behind as if holding a gun.⁶¹

In determining if the three requirements for compensability were met, the court found that whether the injury is mental or physical, the injury must be causally connected with the employment to meet the "arising out of the employment" requirement.⁶² The court reasoned that requiring mental injuries to result from greater stress than the usual day-to-day stress of employment would be a step back to the original definition of "by accident" as an "untoward or unexpected event."⁶³ This definition of accident was rejected in *Evans v. Yankeetown Dock Corp.* and replaced with "unexpected injury or death."⁶⁴ The problem with this reasoning is that in *Hansen*, the court focused on the causation or the "arising out of the employment" requirement, and not the "by accident" requirement that the *Evans* court considered when it discussed the "untoward or unexpected event" notion.⁶⁵ The *Hansen* court followed the *Evans* court's lead in rejecting the "unusual or unexpected event" definition of "by accident," and also rejected the "unusualness" test for determining causation.⁶⁶ However, the court neglected to set out a definite test for causation, probably because the causation issue was easy to resolve in *Hansen*.⁶⁷

Relying on *Hansen* as precedent, the court of appeals in *North Clark Community Hospital v. Goines*⁶⁸ found that the Workers' Com-

60. *Hansen v. Von Duprin*, 507 N.E.2d 573, 576 (Ind. 1987).

61. *Id.* at 577.

62. *Id.* at 576.

63. *Id.*

64. *Id.* at 575 (citing *Evans v. Yankeetown Dock Corp.*, 491 N.E.2d 969 (Ind. 1986)).

65. See Spengler, *Hansen v. Von Duprin: Have the Floodgates Opened to Workmen's Compensation Claims?*, 21 IND. L. REV. 453, 458 (1988).

66. *Id.* at 459.

67. *Id.*; *Hansen*, 507 N.E.2d at 575.

68. 545 N.E.2d 30 (Ind. Ct. App. 1989).

pensation Act provided coverage when a third party caused a sudden mental stimulus that was not directed at the employee.⁶⁹ In *North Clark Community Hospital*, a nurse's aide took the vital signs of a female patient whose husband was visiting her. After leaving the room, the nurse's aide heard two gunshots. She correctly assumed that the patient's husband had shot the patient and then shot himself. The nurse's aide suffered depression from hearing the shooting. The court had no difficulty in finding that two of the compensability requirements were met: the injury occurred "by accident" and "in the course of employment."⁷⁰

The court then focused on whether a causal connection existed between the injury and the employment so that the injury would meet the third requirement of "arising out of the employment." The court followed *Hansen* by ruling that a mental injury did not require a different standard from a physical injury in proving causation.⁷¹ The court stated that a causal connection would exist if "the accident arises out of a risk which a reasonably prudent person might comprehend as incidental to the employment at the time of entering into it, or when the facts show an incidental connection between the conditions under which [the] employee works and the injury."⁷² The court held that because of the circumstances surrounding the accident, the aide's risk and resulting injury were incidentally related to the employment.⁷³

The hospital argued that a causal connection between the depression and the employment could not be shown because the stimulus was not directed at the employee. The court refused to require any additional causation requirements for recovery for mental injuries.⁷⁴ The court analogized this case to third party assault cases, which use an "increased risk" test to determine causal connection, and which yield the same result on compensability.⁷⁵ The risk actually incurred by the nurse's aide and the risk of assault by a third party not connected to the employment fall into the category of neutral risks. A majority of courts finds accidents resulting from neutral risks compensable if the risk was increased because of the employment.⁷⁶ The court found that the aide's job exposed her to increased contact with the public in the form of

69. *Id.* at 32.

70. *Id.* at 31.

71. *Id.*

72. *Id.* (quoting *Lasear, Inc. v. Anderson*, 99 Ind. App. 428, 434, 192 N.E. 762, 765 (1934)).

73. *Id.* at 32.

74. *Id.* at 31.

75. *Id.* at 31-32.

76. See 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 11.11 (1990).

patients and visitors; therefore, an analogy between the present case and third party assault cases would not change the result.⁷⁷ Even though the court demonstrated how the increased risk test would apply, its decision was based on the risk being incidental to the employment.⁷⁸ Using this test is consistent with the test that does not add requirements for causation in mental injury cases. Through *North Clark Community Hospital*, Indiana moves one step closer to enunciating an explicit causation standard in mental injury cases.

*D. Employer's Obligation to Indemnify
Third-Party Tortfeasors*

During the survey period, the court of appeals decided that an employer can agree to indemnify a third party for an employee's injuries caused by the employer's negligence.⁷⁹ In *Indianapolis Power & Light Co. v. Brad Snodgrass, Inc.*,⁸⁰ J.A. House, Inc. served as the general contractor on an air conditioning project at an Indianapolis Power & Light (IPL) station. Brad Snodgrass, Inc. was one of House's sub-contractors. The contract between House and Snodgrass contained an indemnity provision stating that Snodgrass would indemnify House and IPL for bodily injury and property damage due to Snodgrass's work. IPL's job specifications also included a similar indemnity provision. One of Snodgrass's employees was injured on the job and brought a negligence suit against IPL and House.⁸¹ IPL and House filed a third-party complaint against Snodgrass, relying on the indemnity provision in the contract and on common law theories of indemnity to recover for liability imposed on them for the worker's injuries attributable to Snodgrass's negligence.⁸² IPL and House appealed the trial court's grant of summary judgment to Snodgrass.⁸³

The negligence action against IPL and House required the court to address how Indiana's Comparative Fault Act affects third-party complaints for indemnification. The court noted that, taken together, the Workers' Compensation Act and the Comparative Fault Act excluded the employer from liability.⁸⁴ The exclusive remedy provision of the Workers' Compensation Act prevented the injured worker from suing the employer for negligence,⁸⁵ and the Comparative Fault Act

77. *North Clark Community Hosp.*, 545 N.E.2d at 32.

78. *Id.*

79. *Indianapolis Power & Light Co. v. Brad Snodgrass, Inc.*, 548 N.E.2d 1197, 1200-01 (Ind. Ct. App. 1990).

80. *Id.*

81. *Id.* at 1197.

82. *Id.*

83. *Id.*

84. *Id.* at 1198.

85. *Id.* (citing IND. CODE § 22-3-2-6 (1988)).

excluded the employer from the apportionment of fault process.⁸⁶ Thus, under the Comparative Fault Act, all the fault, including that of an immune employer, had to be allocated among the plaintiff, the defendant, and any nonparty, which by definition does not include the employer.⁸⁷

The court found that any vicarious liability of IPL and House resulted from the apportionment process under the Comparative Fault Act and not from the doctrine of respondeat superior, which Snodgrass had relied on in its motion for summary judgment.⁸⁸ Indeed, Snodgrass could not be included in the apportionment of fault under Indiana's Comparative Fault Act.⁸⁹ Therefore, the court found that IPL and House could be held vicariously liable for Snodgrass's negligence.⁹⁰ The court further held that because Snodgrass had agreed to indemnify IPL and House for any vicarious liability due to its negligence, the portion of Snodgrass's fault had to be determined.⁹¹ The court reversed the trial court's decision and remanded the case for a determination of the amount of Snodgrass's vicarious liability.⁹²

E. Employer's Right to Reimbursement from a Third-Party Tortfeasor

In *Calvary Temple Church, Inc. v. Paino*,⁹³ the court of appeals explored the issue of employer reimbursement rights when the injured worker and a third party reach an agreement that does not meet the definition of a settlement under Indiana Code section 22-3-2-13. The court also found that the employer is obligated to pay its pro rata share of the injured worker's attorney fees.⁹⁴

In *Calvary Temple*, the injured worker received temporary total disability in accordance with an agreement filed with the Workers' Compensation Board. The employer's insurer agreed to pay permanent partial impairment to the injured worker on March 18, 1988. The injured worker then sued a third-party tortfeasor and reached an agreement with him on May 3, 1988.⁹⁵ The agreement did not mention the

86. *Id.* (citing IND. CODE § 34-4-33-2(a) (1988)).

87. *Id.* at 1198-99.

88. *Id.* at 1199.

89. *Id.* at 1200.

90. *Id.*

91. *Id.*

92. *Id.* at 1201. This decision was appealed to the Indiana Supreme Court, and oral argument was heard September 19, 1990. At the time of this writing, the decision had not been released.

93. 555 N.E.2d 190 (Ind. Ct. App. 1990).

94. *Id.* at 194.

95. *Id.* at 192.

injured worker's employer or its insurer, nor was the agreement signed by them. The trial court did not dismiss the lawsuit or enter a lien protecting the insurer's reimbursement rights.⁹⁶ A single hearing member found the employer liable for the injured worker's medical expenses and permanent partial impairment because the injured party's agreement with the third-party tortfeasor was not technically a settlement as defined by Indiana Code section 22-3-2-13.⁹⁷ The full board affirmed the award.⁹⁸

On appeal, the court found that the employer was liable for medical expenses and permanent partial impairment before the injured worker entered into the agreement with the third party.⁹⁹ Because the Workers' Compensation Board ordered that the employer be reimbursed from any final settlement between the injured worker and the third party, the court found it unnecessary to determine whether the agreement was a settlement as defined by Indiana Code section 22-3-2-13.¹⁰⁰

The court also affirmed a settled rule that the employer is obligated to pay its pro rata share of the injured worker's costs and expenses in asserting the third-party claim.¹⁰¹ The employer benefits not only by being reimbursed by the third party, but also by having liability for future compensation payments terminated. Therefore, the pro rata share of attorney fees should be based on the amount of benefits already paid and the amount remaining to be paid minus the costs and expenses of bringing the claim.¹⁰² Additionally, the court found that the Workers' Compensation Board acted within its authority in awarding interest on the judgment.¹⁰³

F. Statute of Limitations

The only case concerning the statute of limitations decided during the survey period was *R.L. Jeffries Trucking Co. v. Cain*.¹⁰⁴ *Jeffries Trucking* involved a worker who was severely injured in a truck accident that occurred as he made a delivery for his employer. One of the worker's injuries required amputation of his left leg at the hip. Over time, the injured worker developed debilitating muscle spasms and boils at the amputation site. Within two months of the accident, the worker entered into a Form 12 agreement with the employer's insurer to pay

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 193-94.

100. *Id.*

101. *Id.* at 194.

102. *Id.*

103. *Id.* at 195.

104. 545 N.E.2d 582 (Ind. Ct. App. 1989).

workers' compensation benefits; the agreement was approved by the Workers' Compensation Board. More than two years after the accident but less than two years after the last payment under the original award, the injured worker filed a Form 14, requesting review of the agreement based on a change in conditions.¹⁰⁵ The form alleged permanent total disability and permanent partial impairment. The employer moved to dismiss, arguing that the injured worker's application was barred by the statute of limitations because the application was filed more than two years after the date of the accident.¹⁰⁶ The single hearing officer denied the employer's motion to dismiss, and the full Board affirmed.¹⁰⁷ The employer appealed the award of permanent total disability and all past and future medical expenses allowed by statute.¹⁰⁸

The employer raised two significant issues on appeal: 1) whether an employer can be bound by a Form 12 agreement entered into by the injured worker and the employer's insurer when the employer was not a party to the agreement, and 2) whether the statute of limitations barred the injured worker's Form 14 application for permanent total disability and permanent partial impairment.¹⁰⁹ Addressing the first issue, the employer argued that it could contest the injured worker's status as an employee because the employer was not a party to the Form 12 agreement.¹¹⁰ In reaching its decision, the court of appeals relied on a Georgia case in which the court held that the insurer is the alter ego of its insured.¹¹¹ The Indiana court noted that both Georgia and Indiana statutorily define "employer" to include the employer's insurer.¹¹² The court held that in the absence of mistake, fraud, or duress, the employer could not escape the admission of liability created by the Board's approval of the Form 12 agreement.¹¹³

The statute of limitations issue required the court to determine which statute governed. The employer relied on Indiana Code section 22-3-3-3, which requires a claim for injuries resulting directly from the accident to be filed within two years of the accident.¹¹⁴ The injured worker argued for the application of Indiana Code section 22-3-3-27,

105. *Id.* at 583.

106. *Id.*

107. *Id.*

108. *Id.* at 585.

109. *Id.* at 586.

110. *Id.*

111. *Id.* (citing *Tuck v. Fidelity & Casualty Co. of N.Y.*, 131 Ga. App. 807, 207 S.E.2d 210 (1974)).

112. *Id.* at 586-87 (comparing GA. CODE ANN. § 114-101 (Supp. 1990) and IND. CODE § 22-3-6-1 (Supp. 1990)).

113. *Id.*

114. *Id.* at 588.

which requires a claimant whose condition changes to file for a modification of an award within two years of the last payment made under the original award.¹¹⁵ The court stated that if the accident had directly caused the injured worker's condition, his claim would be barred; but if his condition had resulted from the original injuries, his claim would be considered timely filed under Indiana Code section 22-3-3-27.¹¹⁶

Although the injured worker claimed permanent total disability and permanent partial impairment, the Board characterized its award as one for only permanent total disability.¹¹⁷ The court noted that the Board's finding that the muscle spasms and boils had developed at the amputation site supported the conclusion that the permanent disability resulted from the amputation and not the accident.¹¹⁸ Because no case law existed that distinguished direct harm from resulting harm in the disability area, the court examined decisions distinguishing the types of harm in the area of impairment. The court cited cases holding that Indiana Code section 22-3-3-27 controls in cases of impairment not directly caused by the accident, and decided that the reasoning should be extended to cover disability not directly caused by the accident.¹¹⁹ In support of the extension, the court pointed to Form 14, which includes a change in disability as one of the reasons for a review.¹²⁰ The court also noted that the application of Indiana Code section 22-3-3-27 was consistent with the humanitarian purposes of the Workers' Compensation Act.¹²¹

G. Credit

During the survey period, the court of appeals decided that the state should be entitled to a credit for Public Law 35 salary benefits paid against an award for permanent total disability.¹²² In *Indiana v. Doody*, a totally disabled state worker had received his full salary from the state for one year pursuant to Indiana Code section 4-15-2-6.¹²³ The board then awarded him \$166 per week for the period of permanent total disability, 500 weeks, beginning at the date of the accident. The

115. *Id.*

116. *Id.*

117. *Id.* at 588-89.

118. *Id.* at 588.

119. *Id.* at 589.

120. *Id.*

121. *Id.*

122. *Indiana v. Doody*, 556 N.E.2d 1357, 1360-61 (Ind. Ct. App. 1990).

123. Formerly IND. CODE § 4-15-2-5(b) (West 1981) (repealed in 1982). Although Indiana Code § 4-15-2-5(b) was deleted, Indiana Code § 22-3-3-23(b) (West 1990) continues to refer to it, presumably through an oversight in the amendment process.

disabled worker requested a judgment on the award because the state refused to pay permanent total disability benefits for the year that he received the full salary.¹²⁴

The court noted that both Indiana Code section 22-3-3-8 and section 22-3-3-10(b) provide for the payment of total permanent disability benefits.¹²⁵ The Board did not specify under which statute the award was being made. This omission was confusing because section 22-3-3-23(b) provides for a credit against payments made under section 8, but does not provide for a credit for payments made under section 10.¹²⁶ By looking at the dollar figures of the award, the court was able to determine that the total permanent disability payments were made under section 8, entitling the state to a credit for the Public Law 35 salary benefits.¹²⁷ In allowing the credit, the court noted that Indiana Code section 22-3-3-23(b) only refers to a credit for temporary total disability, but the court assumed that the omission of total permanent disability was a clerical error because another clerical error existed in reference to an Indiana Code section 4-15-2-5(b) citation.¹²⁸ Further, the court did not believe that the legislature would decide to allow a credit for section 8 temporary total disability benefits, disallow a deduction for section 10 benefits, and not decide whether to allow a credit or deduction for section 8 total permanent disability benefits.¹²⁹

In a footnote, the court criticized the third district court's interpretation of Indiana Code section 22-3-3-23(a) and (b) in *Indiana State Highway Department v. Robertson*.¹³⁰ The first district in *Doody* suggested that the third district had used section 23(a) and section 23(b) interchangeably, without making a distinction between the deductions mentioned in section 23(a) and section 23(b) and the credit mentioned

124. *Doody*, 556 N.E.2d at 1359.

125. *Id.* at 1360.

126. *Id.* Indiana Code § 22-3-3-23(b) (1988) reads as follows:

(b) Payments to state employees under the terms of IC 4-15-2-5(b) shall be taken as a credit by the state against payments of compensation for temporary total disability during the time period in which the employee is eligible for compensation under both IC 4-15-2-5(b) and section 8 of this chapter. After a state employee is ineligible for payments under IC 4-15-2-5(b) and if he is still eligible for payments for temporary total disability under section 8 of this chapter, any payments for temporary total disability shall be deducted from the amount of compensation payable under section 10 of this chapter. Payments to state employees under the terms of IC 4-15-2-5(b) may not be deducted from compensation payable under section 10 of this chapter.

127. *Doody*, 556 N.E.2d at 1360.

128. *Id.* at 1361 n.6.

129. *Id.*

130. *Id.* at 1361 n.7 (discussing *Robertson*, 482 N.E.2d 495 (Ind. Ct. App. 1985)).

in section 23(b).¹³¹ The *Robertson* court had held that providing a Public Law 35 salary to a state worker did not remove the matter from the Workers' Compensation Act or its exclusive remedy provision because such removal would make Indiana Code section 22-3-3-23(a) unnecessary.¹³² Because section 23(a) is general and section 23(b) specifically refers to Public Law 35 salary benefits, the *Robertson* court must have used section 23(b) in its analysis. The confusion the court is experiencing in interpreting Indiana Code section 22-3-3-23 should signal the legislature that this statute needs clarification.

H. Occupational Disease

Some states have interpreted their workers' compensation acts to cover occupational disease, while others have created separate occupational disease statutes.¹³³ In 1937, Indiana enacted a separate Occupational Diseases Act¹³⁴ because its Workers' Compensation Act had not been interpreted broadly enough to cover workers who had contracted occupational diseases. Although the public policy behind both the Workers' Compensation Act and the Occupational Diseases Act is the same, each act has its own definitions and procedures.¹³⁵ Because of the similarities between the two acts and because the Occupational Diseases Act has generated little case law, courts have sometimes looked to workers' compensation statutes and case law to interpret occupational disease statutory provisions.¹³⁶ Both the Indiana Supreme Court and the Seventh Circuit faced questions about Indiana's Occupational Diseases Act during this survey period.

1. *Definition of Disability.*—The Indiana Supreme Court in *Spaulding v. International Bakers Services, Inc.*¹³⁷ interpreted the definitions of "disablement" and "disability" in the Occupational Diseases Act.¹³⁸ The two plaintiffs suffered compensable occupational diseases and filed claims for total permanent disability with the Workers' Compensation Board. The court of appeals found that the workers' compensation standard should not be used in an occupational disease case to assess

131. *Id.*

132. *Robertson*, 482 N.E.2d at 498.

133. 1B A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 41.10 (1985).

134. IND. CODE §§ 22-3-7-2 to -38 (1988).

135. See IND. CODE §§ 22-3-7-10 and 22-3-6-1 (1988).

136. *Buford v. American Tel. & Tel. Co.*, 881 F.2d 432, 434-35 (7th Cir. 1989) (used workers' compensation cases to make decision); *Spaulding v. International Bakers Servs., Inc.*, 550 N.E.2d 307, 308 (1990) (administrative law judge on case used workers' compensation standard to assess total permanent disability claim).

137. 550 N.E.2d 307 (Ind. 1990).

138. See IND. CODE § 22-3-7-9(e) (1988).

total permanent disability, and that the applicable standard was found in the Occupational Diseases Act definitions of "disability" and "disablement."¹³⁹

The supreme court granted transfer to determine how the definition of those terms in the Occupational Diseases Act should be applied to assess total permanent disability.¹⁴⁰ The supreme court found the definition of "disability" as the state of being "disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he claims compensation or equal wages in other suitable employment."¹⁴¹ The supreme court found that this definition does not indicate whether disability should also be defined in levels of severity.¹⁴² After reviewing other portions of the Act providing for temporary total disability, temporary partial disability, and total permanent disability, the court determined that reading the definition of "disability" as the inability to earn *full* wages would render the different benefits for different levels of disability unnecessary.¹⁴³ Therefore, the court found that the definition of a disability as a loss of wage-earning capacity also includes aspects of severity and duration that are not mentioned in subsection 9(e).¹⁴⁴ The court further stated that to obtain total disability, the claimants must show that they were permanently unable to earn any wages at their last jobs or in any "other suitable employment."¹⁴⁵

In comparing the Occupational Diseases Act definition of "disability" to the definition under the Workers' Compensation Act, the court noted that under the Workers' Compensation Act, disability refers to the capacity to work, while under the Occupational Diseases Act disability refers to the capacity to earn wages.¹⁴⁶ The court also noted that although the standards were quite similar, circumstances may occur in which different results would be reached using the two standards.¹⁴⁷

2. *Exclusivity Provision.*—In a case of first impression, the Seventh Circuit determined whether the Indiana Supreme Court would find an intentional act exception to the exclusive remedy provision of the Occupational Diseases Act.¹⁴⁸ In *Buford v. American Telephone & Telegraph*

139. *Spaulding*, 550 N.E.2d at 308.

140. *Id.*

141. *Id.* at 309 (citing IND. CODE § 22-3-7-9(e) (1988)).

142. *Id.* at 310.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Buford v. American Tel. & Tel. Co.*, 881 F.2d 432 (7th Cir. 1989).

Co., the plaintiff was exposed to benzene in her position as a lab technician. The company doctor diagnosed the plaintiff as suffering from chronic leukopenia, but did not inform her as to her condition. The plaintiff alleged that she contracted chronic leukopenia because of her working conditions and that despite her employer's knowledge that she was being exposed to benzene and other carcinogens, she was not provided with the proper safety equipment.¹⁴⁹ Moreover, she alleged that her employer had concealed the danger and the doctor's diagnosis from her.¹⁵⁰ The court ruled that the trial court correctly found that the plaintiff's chronic leukopenia was compensable under the Occupational Diseases Act.¹⁵¹

Because the Indiana Supreme Court had never decided whether the exclusive remedy provision of the Occupational Diseases Act had any exceptions, the Seventh Circuit referred to workers' compensation cases regarding that issue. The court noted that the intentional tort exception first recognized in *National Can Corp. v. Jovanovich*¹⁵² and then further limited in *House v. D.P.T., Inc.*¹⁵³ applied only in cases involving violent crime.¹⁵⁴ Relying on *Evans v. Yankeetown Dock Corp.*,¹⁵⁵ the court analyzed the language of the Workers' Compensation Act and the Occupational Diseases Act defining compensable injuries and diseases. The court noted that there was no language in the Occupational Diseases Act similar to the workers' compensation requirement that the injury occur "by accident."¹⁵⁶ In some states, the "by accident" requirement is the basis for recognizing an exception for an intentional tort.¹⁵⁷ However, in *Evans*, the court defined "by accident" as an unexpected injury or death, which indicates that the character of the tort is unimportant.¹⁵⁸ Therefore, no distinction on which to base an exception to the exclusivity provision exists. The Seventh Circuit followed the *Evans* court's reasoning that once all the statutory prerequisites were met for jurisdiction under the Workers' Compensation Board, no common law causes of action would be recognized.¹⁵⁹ Thus, the Seventh Circuit refused to recognize an intentional tort exception to the exclusivity provision in the Indiana Occupational Diseases Act.¹⁶⁰

149. *Id.* at 433.

150. *Id.*

151. *Id.* at 434.

152. *Id.* (citing *National Can Corp.*, 503 N.E.2d 1224 (1987)).

153. *Id.* (citing *House*, 519 N.E.2d 1274 (Ind. Ct. App. 1988)).

154. *Id.*

155. *Id.* at 435 (citing *Evans*, 491 N.E.2d 969 (Ind. 1986)).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 436.

III. STATUTES AND REGULATIONS

A. Statutory Changes

As the major statutory change during the survey period,¹⁶¹ the legislature added a chapter on vocational rehabilitation to the Workers'

161. The following are additional legislative changes affecting Indiana Workers' Compensation:

IND. CODE §§ 22-3-2-2, 22-3-7-2 (Supp. 1990). These statutes generally exempt municipal firefighters and police officers from coverage under both the Workers' Compensation Act and the Occupational Diseases Act. A provision was added under both acts to protect those police officers and firefighters when the common council has elected to procure insurance to insure the employees for medical benefits. The provision states that if the medical benefits provided under the insurance policy terminate before the employee is fully recovered, then the common council must continue the benefits until the employee no longer needs them.

IND. CODE §§ 36-8-12-8(a), (b), (e) (Supp. 1990). Subsections (a) and (b) raised the insurance policy coverage requirement from \$40,000 to \$60,000, which would be payable to the beneficiary or estate of a voluntary firefighter who dies from a work-related injury or to the volunteer firefighter who becomes totally and permanently disabled from an on-the-job injury for a continuous period of at least 260 weeks. Subsection (e), which addresses the liability coverage of volunteer firefighters, adds a sentence stating that a voluntary firefighter is not liable for punitive damages for any act performed within the scope of the firefighter's duties. *Id.*

IND. CODE § 36-8-12-10(a) (Supp. 1990). The chapter of the Code on volunteer fire companies added coverage under the Workers' Compensation Act and the Occupational Diseases Act for a volunteer who works for an ambulance company. Coverage was also expanded from medical treatment to include burial expenses as provided in the Workers' Compensation Act and the Occupational Diseases Act. *Id.*

IND. CODE §§ 22-3-3-19, 22-3-7-13 (Supp. 1990). Two changes were made to the presumptive dependency statutes in the Workers' Compensation Act and the Occupational Diseases Act. The age of presumptive dependency was raised from eighteen to twenty-one. The other provision that was changed had required husbands, but not wives, to prove that they were physically and financially incapable of self-support in order to be a presumptive dependent. That provision had been ruled unconstitutional in *K-Mart Corp. v. Novak*, 521 N.E.2d 1346 (Ind. Ct. App. 1988), and was changed to treat husbands the same as wives.

IND. CODE § 22-3-3-29 (Supp. 1990). Language in the statute pertaining to the rights and privileges of an employee or dependent under a guardianship was changed from "mentally incompetent or a minor" to "under guardianship." The amendment also changed the permissive language of the guardian's right to claim and exercise any right or privilege of the employee or dependent to mandatory language. *Id.*

IND. CODE §§ 22-3-5-5(a), (d) (Supp. 1990). Before this amendment to the insurance chapter of the Workers' Compensation Act, the Workers' Compensation Board approved all insurance policy forms. The amendment requires that insurance policy forms now be approved by the Department of Insurance. Before the amendment, subsection (d) required that if an insurer failed or refused to pay a final award or judgment or refused to comply with the Workers' Compensation Act, the approval of the insurance policy form was revoked, and the form had to be resubmitted to the Workers' Compensation Board. The

Compensation Act.¹⁶² Although most states provide for some sort of vocational rehabilitation in their statutes, there is no commonly accepted definition of vocational rehabilitation.¹⁶³ States and commentators fashion

amendment provides that the Workers' Compensation Board will not accept any further proofs of insurance until the insurance company complies with the final award, the judgment, or the Workers' Compensation Act. *Id.*

IND. CODE §§ 27-7-2-1.1 to -38 (Supp. 1990). The workers' compensation chapter of the insurance code was overhauled to change the rate-making process for workers' compensation insurance policies to promote competitive pricing. The purpose of the change was to lower the cost of insurance and make the premiums reflect market conditions. *Id.*

162. Indiana Code § 22-3-12 was added to the Indiana Code as a new chapter to read as follows:

Chapter 12. Vocational Rehabilitation

Sec. 1. An injured employee, who as a result of an injury or occupational disease is unable to perform work for which the employee has previous training or experience, is entitled to vocational rehabilitation services necessary to restore the employee to useful employment.

Sec. 2. When any compensable injury requires the filing of a first report of injury by an employer, the employer's worker's compensation insurance carrier or the self-insured employer shall forward a copy of the report to the central office of the department of human services office of vocational rehabilitation at the earlier of the following occurrences:

(1) When the compensable injury has resulted in temporary total disability of longer than twenty-one (21) days.

(2) When it appears that the compensable injury may be of such a nature as to permanently prevent the injured employee from returning to the injured employee's previous employment.

Sec. 3. Upon receipt of a report of injury under section 2 of this chapter, the office of vocational rehabilitation shall immediately send a copy of the report to the local office of vocational rehabilitation located nearest to the injured employee's home.

Sec. 4. (a) The local office of vocational rehabilitation shall, upon receipt of the report of injury, immediately provide the injured employee with a written explanation of:

(1) the rehabilitation services that are available to the injured employee; and

(2) the method by which the injured employee may make application for those services.

(b) The office of vocational rehabilitation shall determine the eligibility of the injured employee for rehabilitation services and, where appropriate, develop an individualized rehabilitation plan for the employee.

(c) The office of vocational rehabilitation shall implement the rehabilitation plan. After completion of the rehabilitation program, the office of vocational rehabilitation shall provide job placement services to the rehabilitated employee.

Sec. 5. Nothing contained in this chapter shall be construed to affect an injured employee's status regarding any benefit provided under IC 22-3-2 through IC 22-3-7.

IND. CODE § 22-3-12 (Supp. 1990).

163. See generally, Note, *Vocational Rehabilitation for the Industrially Injured Worker*, 28 U. FLA. L. REV. 101, 102 (1975).

definitions responsive to their own philosophic goals. For example, one state defines vocational rehabilitation as "[a]ssisting in the return of an injured worker to gainful employment at a justifiable cost, within a reasonable time after he is injured, or contracts an occupational disease."¹⁶⁴ Another state defines vocational rehabilitation in terms of its purpose "to return the injured employee to a job related to the employee's former employment or to a job in another work area which produces an economic status as close as possible to that the employee would have enjoyed without disability."¹⁶⁵ The International Association of Industrial Accident Boards and Commissions, in its model program, defines vocational rehabilitation as "the restoration of an occupationally disabled employee to his/her optimum physical, mental, vocational, and economic usefulness."¹⁶⁶ A common thread in the above definitions is that they focus on the subjective goals of vocational rehabilitation rather than objectively setting forth the process for vocationally rehabilitating the occupationally disabled employee. Indiana's new statute states that its goal is "to restore the employee to useful employment,"¹⁶⁷ but does not define the term "useful employment." Similar to other state statutes, Indiana's statute focuses on a subjective goal.

In 1972, the National Commission on State Workmen's Compensation Laws issued a report that included eighty-four recommendations for improving workers' compensation systems.¹⁶⁸ Of the eighty-four recommendations, twelve concerned rehabilitation.¹⁶⁹ The commission con-

164. INTERNATIONAL ASS'N OF INDUS. ACCIDENT BDS. & COMM'NS, AN OVERVIEW OF VOCATIONAL REHABILITATION IN WORKERS' COMPENSATION 5 (1984) (citing NEV. ADMIN. CODE ch 616, § 8 (1987)).

165. MINN. STAT. ANN. § 176-102 (West 1990).

166. INTERNATIONAL ASS'N OF INDUS. ACCIDENT BDS. & COMM'NS, AN ANALYSIS OF WORKERS' COMPENSATION REHABILITATION LAWS AND PROGRAMS OF THE MEMBER JURISDICTIONS 10 (1987) [hereinafter LAWS AND PROGRAMS].

167. IND. CODE § 22-3-12-1 (Supp. 1990).

168. See generally REPORT OF THE NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS (1972).

169. The following are the twelve recommendations concerning rehabilitation:

R4.1 We recommend that the worker be permitted the initial selection of his physician, either from among all licensed physicians in the State or from a panel of physicians selected or approved by the workmen's compensation agency.

R4.2 We recommend there be no statutory limits of time or dollar amount for medical care or physical rehabilitation services for any work-related impairment.

R4.3 We recommend that the workmen's compensation agency have discretion to determine the appropriate medical and rehabilitation services in each case. There should be no arbitrary limits by regulation or statute on the types of medical services or licensed health care facilities which can be authorized by the agency.

cluded that "[i]n general, workmen's compensation is not doing an effective job of assuring that workers with work-related disabilities [are] helped to recover lost abilities and to return to their previous jobs, or, where this is impossible, to learn substitute skills."¹⁷⁰

In response to the commission report, the majority of states established vocational rehabilitation programs. In 1976, only twenty-seven states had some type of rehabilitation program.¹⁷¹ The January 1990 analysis of workers' compensation laws prepared and published by the United States Chamber of Commerce lists South Carolina as the only state without a specific statutory provision regarding vocational rehabilitation.¹⁷²

Moreover, the Indiana Legislative Services Agency's Sunset Audit of the Industrial Board (now the Workers' Compensation Board) recommended the addition of a vocational rehabilitation program to the

R4.4 We recommend that the right to medical and physical rehabilitation benefits not terminate by the mere passage of time.

R4.5 We recommend that each workmen's compensation agency establish a medical-rehabilitation division, with authority to effectively supervise medical care and rehabilitation services.

R4.6 We recommend that every employer or carrier acting as employer's agent be required to cooperate with the medical-rehabilitation division in every instance when an employee may need rehabilitation services.

R4.7 We recommend that the medical-rehabilitation division be given the specific responsibility of assuring that every worker who could benefit from vocational rehabilitation services be offered those services.

R4.8 We also recommend that the employer pay all costs of vocational rehabilitation necessary to return a worker to suitable employment and authorized by the workmen's compensation agency.

R4.9 We recommend that the workmen's compensation agency be authorized to provide special maintenance benefits for a worker during the period of his rehabilitation. The maintenance benefits would be in addition to the worker's other benefits.

R4.10 We recommend that each State establish a second injury fund with broad coverage of pre-existing impairments.

R4.11 We recommend that the second injury fund be financed by charges against all carriers, State funds, and self-insuring employers in proportion to the benefits paid by each, or by appropriations from general revenue, or by both sources.

R4.12 We recommend that workmen's compensation agencies publicize second injury funds to employees and employers and interpret eligibility requirements for the funds liberally in order to encourage employment of the physically handicapped.

Id. at 79-84.

170. *Id.* at 81.

171. LAWS AND PROGRAMS, *supra* note 166, at 14.

172. UNITED STATES CHAMBER OF COMMERCE, HISTORY OF WORKERS' COMPENSATION AND EMPLOYER'S LIABILITY, 1990 ANALYSIS OF WORKERS' COMPENSATION LAWS 28-29.

Workers' Compensation Act.¹⁷³ Presumably in response to the Sunset Audit, the Indiana legislature considered vocational rehabilitation for the first time in the 1988 spring session.¹⁷⁴ Although the reform activity during that session focused on increasing workers' compensation and occupational disease benefits, vocational rehabilitation was also an important issue.¹⁷⁵ Senate Bill 402, essentially a benefits bill, was amended to include a relatively comprehensive vocational rehabilitation provision.¹⁷⁶

173. The Sunset Audit stated:

Effective rehabilitation programs, both physical and vocational, not only help workers regain their pre-injury physical and income earning capabilities, but can also help hold down workers' compensation costs over the long run. The purpose of rehabilitation services is to minimize the losses which occur as a result of an industrial accident. Rehabilitation can be considered as part of medical care and has the same basic purpose as medical care — to cure and relieve the employee from the effects of the injury. The idea is to provide those services which will speed the return of the worker to his job. The positive by-product of effective rehabilitation is that the system is not overloaded with costly numbers of permanently injured workers (either partially or totally).

OFFICE OF FISCAL REVIEW, IND. LEGIS. SERVS. AGENCY, 6 SUNSET AUDIT ON INDUSTRIAL BOARD AND WORKERS' COMPENSATION SYSTEM 91 (1987); *see also* IND. CODE § 4-26-3-25 to -25.7 (1988) (section requires that certain state agencies including the Industrial Board and the Workers' Compensation System be systematically reviewed to determine whether they should be continued, and to examine the organizational characteristics that enhance or hinder efficiency and effectiveness).

174. *See generally* SUBJECT INDEX TO HOUSE AND SENATE JOURNALS, 1988 SESSION (of the twenty-three bills indexed under Workmen's Compensation, five of those bills focused on increases in the benefits scheme) [hereinafter INDEX]; *see also* Gary Post Tribune, Nov. 15, 1987, Business Section.

175. INDEX, *supra* note 174. Representative Boatwright offered the vocational rehabilitation amendment to Senate Bill 402 on February 5, 1988, and it passed on a roll call vote of 68 yeas to 28 nays. INDIANA HOUSE JOURNAL, 1988 SESSION at 424 [hereinafter HOUSE].

176. The vocational rehabilitation provision of Senate Bill 402 reads as follows:

SECTION 1. IC 22-3-3-4.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS: Sec. 4.5(a) An injured employee who, as a result of an injury, is unable to perform work for which the employee has previous training or experience, is entitled to vocational rehabilitation services, including retraining and job placement, necessary to restore the employee to useful employment. The cost of the vocational rehabilitation shall be paid by the employer.

(b) If vocational rehabilitation services are not voluntarily offered and accepted, a member, on the member's own motion or upon application of the employee, carrier, or employer, after affording the parties an opportunity to be heard, may refer the employee to a facility approved by the industrial board for evaluation of the need for, and kind of service, treatment, or training necessary and appropriate to render the employee fit for a remunerative occupation. Upon receipt of the report of the facility, a member may order that the services and treatment recommended in the report be provided at the expense of the employer.

The amended bill passed the House of Representatives, but the Senate dissented from the House amendments on vocational rehabilitation, which were subsequently stripped from the bill in conference committee.¹⁷⁷ The benefits element of Senate Bill 402 became Public Law 95.¹⁷⁸ Although vocational rehabilitation did not survive the conference committee, it remained alive as an issue worthy of study, assigned to the Interim Study Committee on Insurance Issues.¹⁷⁹

In the fall of 1988, the Interim Study Committee on Insurance Issues Subcommittee on Vocational Rehabilitation held three meetings.¹⁸⁰ By consensus, the committee approved two recommendations on vocational rehabilitation:

1. The General Assembly should examine mandating the compilation of certain statistical data by the Worker's Compensation Board.
2. The General Assembly should impose a requirement that worker's compensation recipients be informed by either the employer, the worker's compensation carrier, or the Workers' Compensation Board that vocational rehabilitation services are available through the Office of Vocational Rehabilitation of the Indiana Department of Human Services. The notice

(c) A member may order that any employee participating in vocational rehabilitation is entitled to receive additional payments for transportation or for any extra and necessary expense during the period arising out of the employee's program of vocational rehabilitation.

(d) Vocational rehabilitation training, treatment, or service may not extend for more than fifty-two (52) weeks. However, a member, after review, may extend the period for up to fifty-two (52) additional weeks.

(e) If there is an unjustifiable refusal to accept rehabilitation after a decision of a member, the member shall order a loss or reduction of compensation in an amount determined by the member for each week of the period of refusal, except for specific compensation payable under section 10 of this chapter.

(f) If a dispute arises between the parties concerning application of this section, any of the parties may apply for a hearing before the industrial board.

HOUSE, *supra* note 175, at 423.

177. See INDIANA CHAMBER OF COMMERCE, LEGISLATIVE REPORT (Mar. 3, 1988) (provisions removed from Senate Bill 402 and opposed by the Indiana Chamber of Commerce included "mandatory vocational rehabilitation of up to 104 weeks").

178. See SENATE JOURNAL, 1988 SESSION at 525 [hereinafter SENATE] (information provided through contact with the Indiana Legislative Services Bureau); HOUSE, *supra* note 175, at 645.

179. MINUTES OF THE VOCATIONAL REHAB. SUBCOMM. OF THE INTERIM STUDY COMM. ON INS. ISSUES, INDIANA HOUSE OF REPRESENTATIVES, September 20, 1988.

180. The subcommittee meetings were held Sept. 20, 1988, Sept. 27, 1988, and Oct. 18, 1988.

shall be given in writing, on a form devised by the Workers' Compensation Board.¹⁸¹

In the 1989 spring session of the General Assembly, companion vocational rehabilitation bills were introduced in the House and Senate.¹⁸² Reform recommendations that had been rejected by the Interim Study Committee provided the basis for Senate Bill 543. It was authored by Senator Bushemi, and its companion House Bill 1385 was introduced by Representative Boatwright.¹⁸³ Like the earlier proposed amendment to Senate Bill 402, this bill also specified when an injured worker is entitled to vocational rehabilitation, how to determine if the rehabilitation

181. MINUTES OF THE INTERIM STUDY COMM. ON INS. ISSUES, INDIANA HOUSE OF REPRESENTATIVES, Oct. 18, 1988.

182. See H.R. 1385, 106th Leg., 2d Sess., Indiana (1989); S. 543, 106th Leg., 2d Sess., Indiana (1989).

183. Proposed S. 543 and H.R. 1385 provided:

SECTION 1. IC 22-3-12 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS:

Chapter 12. Vocational Rehabilitation

Sec. 1. An injured employee who, as a result of an injury or occupational disease, is unable to perform work for which the employee has previous training or experience, is entitled to vocational rehabilitation services necessary to restore the employee to useful employment. The cost of the vocational rehabilitation shall be paid by the employer.

Sec. 2. (a) The vocational rehabilitation division is established within the worker's compensation board.

(b) The board shall employ a director and the vocational rehabilitation counselors necessary to provide the screening and identification of potential vocational rehabilitation recipients under this chapter.

Sec. 3. (a) The board shall determine, at the earliest time possible, whether a recipient of worker's compensation or occupational diseases benefits is eligible for vocational rehabilitation services under this chapter.

(b) The determination of eligibility for vocational rehabilitation services and of awards for additional benefits under section 4 of this chapter may be made by any of the following:

(1) A member of the worker's compensation board.

(2) The full worker's compensation board.

(3) The director of the vocational rehabilitation division.

Sec. 4. Vocational rehabilitation benefits under this chapter may be awarded for up to fifty-two (52) weeks. Benefits may be awarded for more than fifty-two (52) weeks as determined necessary by any of the individuals listed in section (3)(b) of this chapter.

Sec. 5. (a) The vocational rehabilitation division shall certify providers qualified to provide vocational rehabilitation services under this chapter. The division shall maintain a list of certified providers.

(b) Providers certified under this section may be either public sector or private sector providers.

H.R. 1385, 106th Leg., 2d Sess., Indiana (1989); S. 543, 106th Leg., 2d Sess., Indiana (1989).

goal has been reached, and who is to pay the cost.¹⁸⁴ Senate Bill 543 went beyond the Senate Bill 402 amendments in clearly placing the control and direction of vocational rehabilitation with the Workers' Compensation Board by establishing a vocational rehabilitation division within the Board.¹⁸⁵ The bill also authorized the hiring of additional staff, provided a framework for determining eligibility, and required certification of providers of vocational rehabilitation services.¹⁸⁶ Like the Senate Bill 402 amendment, this bill contained a fifty-two-week limit for vocational rehabilitation benefits.¹⁸⁷

House Bill 1385, the companion to Senate Bill 543, died without a hearing in the last days of the session. Representatives opposed to workers' compensation reform failed to attend the remaining meetings, depriving the committee of the quorum needed to conduct business.¹⁸⁸

Senate Bill 543 was referred to the Standing Pensions and Labor Committee, where the bill was held by the chairman until late in the session.¹⁸⁹ Interest groups took the same position relative to proposed Senate Bill 543 as they had taken relative to the vocational rehabilitation amendment to Senate Bill 402 during the 1988 session.¹⁹⁰ The Indiana Trial Lawyers' Association, providers of rehabilitation services, individual labor organizations, and employee interest groups supported the proposed vocational rehabilitation bill.¹⁹¹ The Indiana Manufacturers Association and the Indiana Chamber of Commerce, consistent with their testimony before the Vocational Rehabilitation Subcommittee, would only support referral of injured workers to the existing federal/state program with no obligation on employers to pay for the vocational rehabilitation.¹⁹²

Senator Bushemi was forced to cut significant parts of his proposed bill and to accept a simple referral mechanism, or Senate Bill 543 and vocational rehabilitation would have died in committee like the companion House Bill 1385.¹⁹³ After consulting supporters of workers' compensation

184. See *supra* notes 176 & 183.

185. *Id.*

186. See *supra* note 183.

187. See *supra* notes 176 & 183.

188. Telephone conversations with the Honorable John Bushemi, Indiana State Senator (Aug. 3, 1989, and Nov. 6, 1989) [hereinafter Telephone Conversations]; see also INDIANA STATE AFL-CIO, 89 STATE OFFICE SCOOPS No. 5 (Feb. 16, 1989) (copy on file at the Indiana Law Review office).

189. Telephone conversations, *supra* note 188.

190. *Id.*

191. *Id.* See also AFL-CIO, LEGISLATIVE AGENDA FOR 1989 (unpublished manuscript) (on file at the Indiana Law Review office).

192. Telephone conversations, *supra* note 188.

193. *Id.*; see also INDIANA STATE AFL-CIO, STATE HOUSE LEGISLATIVE WRAP-UP at 1 (Oct. 1989).

reform, he decided that a simple referral or notice provision would be at least a first step in a long-term reform effort.¹⁹⁴ A stripped-down Senate Bill 543 proceeded through the legislative process to become Chapter 12 of Indiana's Workers' Compensation Act.¹⁹⁵ Had Senate Bill 543 been enacted into law as proposed, Indiana would have had a solid foundation for a comprehensive vocational rehabilitation program. Instead, the legislative process of compromise yielded statutory provisions that are vague and lacking in administrative direction.

*B. Policy Issues In Implementing Vocational Rehabilitation
In A Workers' Compensation System*

1. Goals and Obligations of Vocational Rehabilitation.—A comprehensive vocational rehabilitation scheme must have a clearly stated and objectively measurable goal. The goal provides the basis for key policy decisions, such as who should be eligible to receive vocational rehabilitation benefits, what types of services should be provided, and who should administer vocational rehabilitation.

The 1989 vocational rehabilitation amendment to the Indiana workers' compensation law fails to establish a clearly stated and objectively measurable goal.¹⁹⁶ The new statute provides that the goal of vocational rehabilitation is "to restore the employee to useful employment."¹⁹⁷ Yet, the term "useful employment" is not defined and therefore invites litigation. The statute offers no guidance as to whether the goal is to return the worker to or near the worker's pre-injury earning capacity, or whether a minimum wage position or a sheltered workshop position constitutes "useful employment."

Indiana's vocational rehabilitation statute places the entire burden of managing vocational rehabilitation on the federal/state program. However, the goals of vocational rehabilitation in the context of workers' compensation differ fundamentally from the goals established by the federal regulations that control federal/state vocational rehabilitation programs.¹⁹⁸ The goal of rehabilitation within the workers' compensation context is the prompt return of the worker to gainful employment, while the goal of rehabilitation within the federal/state vocational rehabilitation program — the Indiana Office of Vocational Rehabilitation — is a much

194. Telephone conversations, *supra* note 188.

195. IND. CODE § 22-3-12 (Supp. 1990); see text of statute, *supra* note 162.

196. See generally IND. CODE §§ 22-3-12-1 to -5 (Supp. 1990).

197. *Id.* § 22-3-12-1.

198. LAWS AND PROGRAMS, *supra* note 166, at 12 (citing the REPORT OF THE NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS).

broader mandate, the maximization of human potential.¹⁹⁹ Efforts to maximize the human potential of an injured worker are beyond the purpose and scope of the workers' compensation system.

These differing goals raise issues concerning whether the goals of the Workers' Compensation Act or the goals of the federal/state program will control an injured worker's eligibility for vocational rehabilitation and will control the content of the program.

2. *Who Should Receive Vocational Rehabilitation?*—Not every worker who has been injured on the job is entitled to vocational rehabilitation benefits.²⁰⁰ To be entitled to rehabilitation benefits, an injured worker must be left with a disability that brings the worker within the eligibility criteria established either by statute or by administrative rule. In Indiana, an inability to perform work for which the employee has previous training or experience qualifies the employee for vocational rehabilitation under the Workers' Compensation Act.²⁰¹ Without statutory definition or administrative clarification, the eligibility criteria in the vocational rehabilitation provision are problematic. Does the "work for which the employee has previous training or experience" refer to the injured employee's customary occupation, or to *any* previous gainful occupation? Courts in jurisdictions with similar entitlement criteria have held that such work does not mean all work for which an injured employee may have had previous training or experience, but rather the employee's customary occupation.²⁰² To avoid litigation over the eligibility criteria, Indiana should promulgate a clarifying statutory definition or an administrative rule.

Indiana Code section 22-3-12-4(b) states that "[t]he office of vocational rehabilitation shall determine the eligibility of the injured employee for rehabilitation services"²⁰³ This provision raises a question about which agency's eligibility criteria are controlling. Will the Office of Vocational Rehabilitation make use of each agency's eligibility criteria, or will the eligibility criteria in the workers' compensation statute be ignored? The lack of legislative guidance on coordinating the workers' compensation system and the federal/state program, each with its individual goals and distinct eligibility criteria, threatens the administrative viability of the vocational rehabilitation provisions.

199. *Id.* at 12-13.

200. Annotation, *Workers' Compensation: Vocational Rehabilitation Statutes*, 67 A.L.R. 4TH 612, 625 (1989).

201. IND. CODE § 22-3-12-1 (Supp. 1990).

The statute reads that "[a]n injured employee, who as a result of an injury or occupational disease is unable to perform work for which the employee has previous training or experience, is entitled to vocational rehabilitation services necessary to restore the employee to useful employment." *Id.*

202. Annotation, *supra* note 200, at 641-47.

203. IND. CODE § 22-3-12-4(b) (Supp. 1990).

3. *What Types of Services Should Be Available?*—Once eligibility is determined, the next step, according to Indiana Code section 22-3-12-4(b), requires the Office of Vocational Rehabilitation to “develop an individualized rehabilitation plan for the employee.”²⁰⁴ An individualized rehabilitation plan is a projected combination of services designed to achieve a specific goal.²⁰⁵

Federal/state programs are client-centered: the client selects an educational objective, and the agency then determines whether the objective is feasible, given the client’s capability.²⁰⁶ If the agency finds that the educational objective is feasible, the agency formulates a plan and supportive services designed to help the client reach the educational goal.²⁰⁷ For example, if a client and the agency agree that a college degree is necessary to reach the client’s career objective, the agency will supply college tuition and related expenses even though a less costly plan could return the client to work.²⁰⁸

Under workers’ compensation rehabilitation programs, the statutory goal is to expediently return the employee to gainful employment, usually under a scheme of priorities.²⁰⁹ A plan designed to meet this goal would require different services than a plan designed to meet the federal/state program goal of maximizing human potential.

4. *Who Should Pay for Vocational Rehabilitation?*—Workers’ compensation benefits, a recognized cost of doing business, should not be shifted from the employer to the general public. Rehabilitation services are an inherent part of the workers’ compensation system — a system based on the exchange of common law rights between employees and employers and governed by the same rationale — this cost of production

204. *Id.*

205. OFFICE OF VOCATIONAL REHAB., IND. DEP’T OF HUMAN SERVS., WHAT YOU SHOULD KNOW ABOUT VOCATIONAL REHABILITATION at 3-4.

206. *Id.*

207. *Id.*

208. *Id.*

209. See Letter from Robert J. Robinson to Professor Ruth C. Vance (Oct. 14, 1988) (discussion of priorities under Montana Vocational Rehabilitation Procedures and attached memorandum); see, e.g., J. LEWIS, THE ILLINOIS WORKERS’ COMPENSATION SYSTEM: A REPORT TO THE GOVERNOR, at 69 (1989) (This report discusses the findings of a study of the Illinois workers’ compensation system. The study analyzed the role of workers’ compensation in general and has a specific chapter that reviews medical and vocational rehabilitation services); see also Niss, *No Litigation Allowed: Maine Rehabilitation Statute Revised*, JOHN BURTON’S WORKERS’ COMPENSATION MONITOR, Sept./Oct., 1989, at 17-18; Address by Douglas K. Langham, Workers’ Compensation Conference at Storrs, Connecticut (May 1, 1987) (Speaker Langham’s presentation concerned worker rehabilitation in Michigan. A copy of the speech is on file at the Indiana Law Review office). Most statutes do not have specific priority listings, but use administrative procedures to determine proper priority status.

should be borne by the industry and the consumers of its goods.

The National Commission on State Workmen's Compensation Laws recommended that "the employer pay all costs of vocational rehabilitation necessary to return a worker to suitable employment and authorized by the workmen's compensation agency."²¹⁰ The 1977 report of the President's Inter-Departmental Workers' Compensation Task Force also recommended that:

The carrier/employer have the primary responsibility for developing and implementing a physical and/or vocational rehabilitation plan for any claimant whose prospect for re-employment and return to former earning capacity would thereby be significantly improved. The carrier/employer should be fully liable for all rehabilitation costs, including maintenance and necessary travel expenses.²¹¹

Not only is the employer responsibility for vocational rehabilitation consistent with the underlying philosophy of workers' compensation, foundation studies and organizations within the workers' compensation system recommend it.²¹²

In response to these and other concerns regarding the implementation and administration of Indiana's new vocational rehabilitation statute, Governor Evan Bayh called a conference on vocational rehabilitation for September 29, 1989.²¹³ This conference was the first step in providing an educational forum to discuss alternative methods of providing vocational rehabilitation services to Indiana citizens injured in the workplace. In issuing his call for a conference on vocational rehabilitation, Governor Bayh questioned whether a taxpayer-supported system is best. The Governor also recognized the need for Indiana to decide on an administrative structure to supervise vocational rehabilitation, monitor plans, collect data, and resolve disputes. As Indiana's statute stands, there is no monitoring of vocational rehabilitation services and, therefore, no method of enforcing the notice provision. Also, the statute provides no guidance on resolving disputes arising under vocational rehabilitation. Further, the statute lacks a mandate to collect data, which is necessary to study the system's cost and efficiency.

210. LAWS AND PROGRAMS, *supra* note 166, at 17 (citing the REPORT OF THE NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS).

211. *Id.* at 15 (citing the 1977 REPORT OF THE PRESIDENT'S INTER-DEPARTMENTAL WORKERS' COMPENSATION TASK FORCE).

212. *Id.*

213. Letter from Governor Evan Bayh (Aug. 29, 1989) (issuing vocational rehabilitation conference call).

If the legislature and the Workers' Compensation Board do not address these issues, the Indiana courts will have to provide answers on a piecemeal basis. Employees and employers will be forced to resort to the uncertain, time-consuming, and costly litigation process — the very problem that the workers' compensation system was originally designed to avoid.

C. Workers' Compensation Board Administrative Rule Proposal

During the survey period, the Workers' Compensation Board proposed a rule concerning administrative hearing procedures for the termination of temporary partial or temporary total disability benefits.²¹⁴ Under the current rule, the employer or its insurer may unilaterally terminate temporary partial or temporary total disability benefits without first conducting a hearing.²¹⁵ The proposal would provide for a pre-termination hearing.²¹⁶ The proposed rule requires the employer to notify the employee and file an Application for Adjustment of Claim with the Workers' Compensation Board before the employer terminates temporary benefits. The employee could request a hearing before a single board member within thirty days of receiving the employer's application. The employer would have a right to appeal an adverse decision to the full Board, but the employer would have to pay benefits during the pendency of the appeal. The employee would also have the right to appeal an adverse decision to the full Board, but benefits would be suspended during the pendency of an employee's appeal. The proposed rule further provides that terminating temporary benefits without following this procedure constitutes prima facie evidence of bad faith as defined in Indiana Code section 22-3-4-12, and the employer would have to pay the employee's attorney fees.²¹⁷

214. 13 Ind. Reg. 1541-1542 (May 1, 1990) (proposal to amend IND. ADMIN. CODE tit. 631, r. 1-1-27).

215. IND. ADMIN. CODE tit. 632, r. 1-1-27 (Supp. 1990).

216. 13 Ind. Reg. 1541 (May 1, 1990) (proposed IND. ADMIN. CODE tit. 631, r. 1-1-27(b)).

217. The proposed rule reads as follows:

(a) No employer may terminate temporary partial/total disability benefits being paid to an employee except upon advance written notice to the employee. This advance written notice from an employer must be accomplished by the filing of a worker's compensation board's Application for Adjustment of Claim with the worker's compensation board, accompanied by a detailed explanation for the proposed termination of benefits, all relevant medical reports, and all other documentation that the employer relies upon to justify the proposed termination of benefits, with a copy to be served on the employee.

A public hearing was held on the proposed rule on June 26, 1990. The Workers' Compensation Board is withholding action on the proposed rule pending the recommendations of a governor-appointed task force

(b) If the employee disagrees with the employer's proposed termination of temporary partial/total disability benefits, the employee may within thirty (30) days after receipt of the employer's Application for Adjustment of Claim submit a request for a hearing with the board. If the employee's request has been made within the allotted time period, temporary partial/total disability benefits may not be terminated until a determination has been made after opportunity for evidentiary hearing that termination of benefits was warranted on the basis of medical evidence or testimony presented. This hearing shall not be held earlier than seventy-five (75) days after the employee's filing of a request for hearing unless the parties would so agree or in the absence of such agreement then for good cause. Such hearing shall be held before a single member of the board or other such person authorized by the board to hear and decide the case. A full record shall be made of the proceedings.

(c) All such proceedings or medical reports shall be admissible so long as the same have been exchanged between the parties at least five (5) days before the hearing and so long as the medical opinions reasonably comply with the spirit of IC 22-3-3-6(e), which sets forth the type of information which should generally be set forth within a medical report. The admissibility of such medical reports shall only be permitted for proceedings of this type and nature concerning the cessation of temporary partial/total disability benefits.

(d) If the decision of the individual member is adverse to the employer, the employer may appeal to the full board, but temporary partial/total disability benefits must continue during the pendency of the appeal. If the decision is adverse to the employee, benefits may be suspended, but the employee may within twenty (20) days following the receipt of the decision appeal to the full board. In the event an appeal is taken, then the full board shall review the record of proceedings before the single worker's compensation board member to determine whether the decision to permit the termination of benefits presented. Such full board review shall be initially scheduled at the next regularly scheduled full board session that has been scheduled at least thirty (30) days in advance of the filing of the appeal to the full board. In the event that the appeal is filed within the thirty (30) day period prior to the next full board's regularly scheduled session, then that appeal shall be scheduled for the subsequent regularly scheduled full board session.

(e) The termination of temporary partial/total disability benefits without the proper notice as set forth in this section will be prima facie evidence of bad faith as defined in IC 22-3-4-12, and the employer shall be liable for the employee's attorney fees. The assessment of these attorney's fees shall be made by the board pursuant to the procedures set forth in IC 22-3-4-12.

(f) [The employer or such employer's insurance carrier shall file with the] worker's compensation [board a memorandum prescribed by the] worker's compensation [board showing payments made, the date of the employee's return to work, the date of cessation and reason for termination of the payments, and any other fact or facts pertaining to the cessation of said payments of compensation and serve upon the employee or his dependents a copy thereof.]

Id. (the bracketed sections represent nonamended portions of the rule).

charged with making recommendations to reform Indiana's workers' compensation system.²¹⁸ Task force recommendations for using independent medical examiners in case of dispute, or recommendations for granting the employee the right to choose the physician, if passed into law by the legislature, could satisfy the oversight and due process concerns of injured workers. If the legislature addresses these concerns, the Workers' Compensation Board will probably find no need to enact its proposed rule.

IV. GOVERNOR'S TASK FORCE ON WORKERS' COMPENSATION AND OCCUPATIONAL DISEASE LAW REFORM

In his 1990 State of the State Address, Governor Bayh said that Indiana's Workers' Compensation Act, which was originally passed in 1929, is in desperate need of in-depth analysis and reform.²¹⁹ The Governor then proposed a task force to study the current law and make recommendations.²²⁰

In June, Governor Bayh appointed six members to the task force; the task force is made up of three representatives of labor and three representatives of management.²²¹ Rogelio Dominguez, Chair of the Workers' Compensation Board, was appointed Chair of the task force. To provide technical guidance, John H. Lewis was hired as a consultant to the task force. Lewis served as General Counsel to the National Commission on State Workers' Compensation Laws. He has also been hired as a consultant to several other governors and state legislatures to analyze state workers' compensation systems and to make recommendations. Most recently, Governor Thompson hired Lewis to analyze and to recommend changes in the Illinois workers' compensation system. Governor Bayh also appointed twenty-six people to a resource panel to assist the task force. The members of the resource panel included representatives of business, labor, the legal profession, the medical profession, and academia.

The resource panel was divided into five sub-committees: agency infrastructure and data management, cost, self-insurance, medical care

218. See *infra* note 220 and accompanying text.

219. E. Bayh, The 1990 State of the State Address and The Bayh/O'Bannon 1990 Legislative Program (Jan. 9, 1990) (unpublished).

220. *Id.*

221. The task force members are Charles Deppert, Indianapolis, President of Indiana State AFL-CIO; Scott Miller, South Bend, President and CEO of Burkhart Advertising, Inc.; William Osos, Danville, Director, Region 3 UAW; James Robinson, Lanesville, Chairman and Secretary of Ace Manufacture, Inc. and Chairman of Stem Wood, Inc.; James Rogers, Carmel, Chairman and CEO of PSI Energy, Inc.; and Michael Sullivan, Indianapolis, Business Manager of Sheet Metal Workers Local 20.

and physical rehabilitation, and compliance and safety initiatives. The subcommittees analyzed Indiana's workers' compensation system in their designated areas, and reported their findings and recommendations to the consultant. The consultant used the subcommittees' findings and recommendations in preparing the report that he presented to Governor Bayh in December 1990.

Lewis's extensive report dealt with many areas of Indiana's workers' compensation system, including administration, medical care, temporary and permanent disability benefits, benefit delivery, occupational disease, and methods of insurance. Lewis fully discussed each area by relating the historical background, comparing Indiana's system to other states' systems, and suggesting alternatives for improving Indiana's system to make it efficient, cost-effective, and responsive to the needs of both employees and employers. Of all the areas needing reform in Indiana's workers' compensation system, Lewis focused on three as essential: medical care, benefit levels, and administration.

The overriding concern in the area of medical care is the choice of the treating physician. Currently, the employer has the statutory right to choose the injured employee's physician. According to Lewis's surveys of workers' compensation recipients, the statute does not have a significant impact on how the physician is actually chosen.²²² In many instances, the emergency room physician becomes the treating physician.²²³ Lewis concluded that although medical costs are not significantly affected by the method of choosing the treating physician, the dispute resolution process is affected.²²⁴ An advantage in the dispute resolution process belongs to the party controlling the choice of physician because the treating physician's opinion, presumed to be favorable to the party choosing the physician, probably will be accorded great evidentiary weight.²²⁵ Furthermore, if the employer chooses the physician, the employee likely will be forced to pay for an outside expert opinion in the event of a dispute.²²⁶ Lewis recommended that an option to change physicians be granted to the party who does not have the initial choice, with the added option of immediate recourse to the Workers' Compensation Board.²²⁷

Other medical care issues concerned cost and dispute resolution. Lewis noted that Indiana's medical costs historically have been low, but

222. J. LEWIS, MAJOR ISSUES IN THE INDIANA WORKER'S COMPENSATION SYSTEM REPORT TO THE GOVERNOR, at 29 (Dec. 1990).

223. *Id.*

224. *Id.* at 30.

225. *Id.* at 30-31.

226. *Id.* at 31.

227. *Id.* at 35.

that that may be because of the low number of serious injuries in Indiana.²²⁸ To contain medical costs, Lewis offered the possibilities of the state instituting a fee schedule or of the insurers monitoring medical costs.²²⁹ Additionally, Lewis suggested that claimants should be protected against lawsuits brought by medical providers to recover unpaid bills associated with workers' compensation injuries by only allowing lawsuits against the employer and insurer.²³⁰ Lewis also recommended the use of independent medical examiners in disputes involving medical issues to reduce the delay and the cost of each party hiring its own experts.²³¹

Lewis addressed both temporary total disability benefits and permanent disability benefits in his report. The report stated that temporary disability benefits, which help to replace income lost during the healing process, are limited to a maximum weekly benefit of \$294, which is 71% of the state's average weekly wage.²³² This maximum weekly benefit is one of the lowest in the country.²³³ The National Council on Compensation Insurance reported that increasing the weekly benefit maximum to \$401 would increase employers' insurance premiums approximately 1.6%.²³⁴ Lewis noted that although many states' maximum weekly benefits fluctuate according to the state average weekly wage so that legislative action to change benefit levels is unnecessary, fixing a dollar amount for the maximum weekly benefits allows the legislature to control costs.²³⁵

As in most states, Indiana's permanent impairment cases represent a small portion of all cases, but the permanent impairment cases account for most of the benefits paid.²³⁶ Even so, Indiana's maximum weekly benefit for permanent impairments of \$120 is less than half of the benefit paid in several other states.²³⁷ Because raising Indiana's maximum weekly benefit to equal the benefits paid in most of the other states would increase insurance premiums at least 14%, Lewis recommended giving greater benefits to those with more serious impairments who are likely to suffer a greater wage loss.²³⁸ The insurance premium increase to raise the benefit level of an injured worker with a 25% impairment from \$15,000 to \$20,000 would be 7.1%.²³⁹

228. *Id.* at 34.

229. *Id.* at 36-37.

230. *Id.* at 37.

231. *Id.* at 37-38.

232. *Id.* at 44.

233. *Id.* at 43, 49.

234. *Id.* at 50.

235. *Id.* at 50-51.

236. *Id.* at 53.

237. *Id.* at 59.

238. *Id.* at 61-62.

239. *Id.* at 62.

The Workers' Compensation Board administers Indiana's workers' compensation laws on an annual budget of approximately \$985,000, which is about 10% of the national average.²⁴⁰ The Board collects minimal data and has no computer system that permits meaningful access to the data. Data access is important to understanding and solving problems in any workers' compensation system.²⁴¹ Lewis recommended the purchase of hardware and software with the capabilities of networking with other agencies and receiving electronic reports of insurance carriers.²⁴² Lewis estimated that such a system would require an initial investment of \$1,000,000 and annual maintenance of \$300,000.²⁴³

Lewis also discussed the existing controversy over the ability of the employer or its insurer to unilaterally terminate temporary benefits without first conducting a hearing.²⁴⁴ Lewis then suggested several alternatives that would accomplish the same purpose as holding a full board hearing before terminating benefits.²⁴⁵

Most of the recommendations in Lewis's report to Governor Bayh were incorporated into legislation introduced in the House this spring in the form of House Bill 1517. House Bill 1517 proposes twenty changes to Indiana's workers' compensation and occupational disease statutes; due to the bill's length, it is not reproduced in the footnotes. The House Labor Committee held a hearing on House Bill 1517 on January 28, 1991, and passed out the bill by a vote of six-two on February 7, 1991.²⁴⁶

On March 28, the Senate Pensions and Labor Committee made several amendments to House Bill 1517.²⁴⁷ Major changes included removing the employee choice of physician, extending the phase-in of the increase in temporary total disability benefits from three years to four years, lowering the benefit level increases for permanent impairment awards, shortening the length of payment of temporary total disability benefits from thirty days to fourteen days during a dispute, requiring the party requesting an independent medical examination to pay the cost, and removing the proposed self-insurance advisory board and self-insurance guarantee fund.²⁴⁸ Even though House Bill 1517 was based on the compromise reached by representatives of both labor and manage-

240. *Id.* at 24.

241. *Id.*

242. *Id.* at 23.

243. *Id.* at 24.

244. *Id.* at 75.

245. *Id.* at 76.

246. INDIANA CHAMBER OF COMMERCE, 6 LEGISLATIVE REPORT, at 1 (Feb. 15, 1991).

247. INDIANA CHAMBER OF COMMERCE, 12 LEGISLATIVE REPORT, at 1 (Mar. 29, 1991).

248. *Id.*

ment, it appears that the bill is not receiving wide support in the legislature and that reform of Indiana's workers' compensation system will be piecemeal because of the political process.

V. CONCLUSION

Both the court decisions and the content of the vocational rehabilitation statute indicate that Indiana is maintaining a conservative position regarding workers' compensation. The task force's organized method of studying the workers' compensation system has yielded proposed legislation that will reform Indiana's system to be responsive to the needs of management and labor. The courts' and legislature's historically conservative stance may change if the 1991 General Assembly enacts the task force's reform recommendations. Nevertheless, the General Assembly will maintain a crucial role in shaping the future direction of Indiana's workers' compensation law.

Recent Developments in Professional Responsibility

CORY BRUNDAGE*

I. INTRODUCTION

The United States Supreme Court, the Indiana Supreme Court and Court of Appeals, and the Indiana Legislature addressed professional responsibility issues during the survey period. This Article examines developments that are of significance to Indiana lawyers.

II. ATTORNEY TRUST ACCOUNT ACT

The Indiana Supreme Court took action twice during the survey period on a matter of significance to practically all practicing lawyers in the state — the Interest-Bearing Attorney Trust Accounts Act¹ (the “Act”). Previously, in 1983 and 1987, the Indiana State Bar Association and the Indiana Bar Foundation petitioned the court for approval of a program that would allow client funds that are presently held in lawyers’ trust accounts without earning interest to be placed in accounts that would generate interest revenues dedicated to such purposes as legal services to the poor.² Under similar programs, adopted in all of the other forty-nine states and the District of Columbia,³ the pooled funds are typically comprised of advances for costs and expenses, collections, and settlement proceeds in amounts too small or held for too short a time to justify the administrative expenses of tracking, accounting for, and paying the interest thereon to the client.⁴ Under present law, attorneys must keep such funds separate from their own and make them available to the client on demand.⁵ Historically, client’s funds were held in non-interest bearing accounts because federal law forbade the payment of interest on accounts that were available on demand.⁶ Congress lifted these constraints for individuals, certain charitable non-profit organizations, and certain public entities in 1980.⁷

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1. IND. CODE §§ 33-20-1-1 to -9-2 (Supp. 1990).

2. *Delegates Act on Law Student Exams, Trust Account Plan*, 33 RES GESTAE 256, 257 (Dec. 1989) [hereinafter *Delegates*].

3. *In re* Indiana State Bar, 500 N.E.2d 311, 311 (Ind. 1990).

4. *Id.* at 313.

5. *Id.*

6. *Id.*

7. *Id.* at 314 (citing the Consumer Checking Account Equity Act of 1980, 12 U.S.C. § 226 (1988)).

Having failed twice to convince the supreme court to adopt such a program, the Bar Association House of Delegates, at its annual meeting in October 1989, voted to seek legislation approving such a program.⁸ On January 18, 1990, the Indiana House of Representatives passed its version of the Act. While the Act was before the Senate in February 1990, the supreme court, characterizing the notice it received from the Bar Association of its intention to seek legislative action as a "petition," considered the issue a third time.⁹ Once again, the court rejected such a program, saying that it was "in conflict with the duties, responsibilities and obligations of the legal profession and each lawyer member in this jurisdiction."¹⁰ Noting the great weight of contrary precedent, the court felt compelled to explain its reasoning.¹¹

First, the court explained that the program was in conflict with the legal principle that interest belongs to the one who owns the money, that is, the client.¹² Attorneys should not divert the interest on clients' money for their own use or anyone else's. "Indeed," the court stated, "commingling . . . funds is the source of the greatest number of disciplinary proceedings brought in this state."¹³

Further, an attorney's first and highest duty is to protect the rights and property of his or her client; therefore, although the program's goals to serve the public interest may be laudatory, "they must be secondary"¹⁴ to the duty to the client. Lawyers may serve the public good by donating their own time, effort, and money, but to use paying clients' money to finance legal assistance to other indigent clients "is nothing more than a transfer of wealth among clients."¹⁵

The court also noted that the recent changes in federal law may make it possible for an attorney to hold trust funds collectively in an interest bearing account in the lawyer's name.¹⁶ If so, and if not impractical with present technology, attorneys "may consider depositing such funds accordingly and including proportionate accrued interest with each remittance to the client."¹⁷ Thus, virtually all non-interest bearing client accounts would be eliminated and the interest earned would properly reach the client.¹⁸

8. *Delegates, supra* note 2, at 257.

9. *Indiana State Bar*, 550 N.E.2d at 316.

10. *Id.* at 311.

11. *Id.*

12. *Id.* at 312.

13. *Id.*

14. *Id.* at 313.

15. *Id.*

16. *Id.* at 314.

17. *Id.*

18. *Id.*

Interestingly, after reciting these arguments, the court disavowed them as the basis for its decision because the facts had not been made “sufficiently well known to us.”¹⁹ Instead, the court reasoned:

[I]f there is a problem here regarding the manner in which banks operate as to lawyers’ trust accounts, or any accounts, that problem may need to be addressed in some manner on its own merits. It does not justify this Court in using it as a reason to authorize the diversion of these funds to the not-for-profit organization suggested. It does not matter where, to whom, or for what purpose the funds would be diverted. The truth of the matter is that clients’ funds would be diverted.²⁰

Finally, the court noted that other state supreme courts had approved provisions that prospectively absolve attorneys from charges of ethical impropriety for exercising, in good faith, their discretion in putting a client’s money into the program.²¹ The court reacted strongly to such provisions:

Lawyers must not be immune from disciplinary proceedings, especially when it comes to administering their clients’ accounts. A lawyer’s fiduciary duty to his client must be held in the highest regard and subject to strict scrutiny. To hold lawyers harmless when they handle so-called “nominal” funds or even greater funds held for a “short” period of time, is to give the members of the bar a free pass where none should exist. . . . It is the responsibility and the duty of this Court to set the rules for attorney discipline and see to it that they are applied in a just and evenhanded manner. Indiana lawyers deserve a clear mandate from this Court regarding the Rules of Professional Conduct. Therefore, in order to avoid any possible misunderstanding by the lawyers of this state, let there be no question that the . . . program currently promoted by the Indiana Bar Association violates our Rules for the Discipline of Attorneys and Rules of Professional Conduct.²²

Over the dissent of Chief Justice Shepard, the State Bar Association’s “petition” to authorize the program was denied. The Bar Association was not, however, content to abandon the cause.

Within four weeks after the Indiana Supreme Court’s rejection of the proposal, a bill establishing such a program was passed by the

19. *Id.*

20. *Id.* at 315.

21. *Id.*

22. *Id.*

Indiana Senate and was signed into law by the Governor.²³ The stage was set for a challenge to the constitutionality of such a legislatively imposed program to regulate the conduct of attorneys.

That challenge quickly materialized in the form of a test case decided on November 2, 1990, entitled *In re Public Law No. 154-1990 (H.E.A. 1044)*.²⁴ The petitioner was a practicing attorney acting on behalf of himself and all others similarly situated. The issue, the court said, was "whether a particular legislative enactment is valid notwithstanding a provision in the Constitution of Indiana that assigns to the judicial branch a subject matter central to the enactment."²⁵

Forewarned of the court's view of provisions for immunity from disciplinary proceedings, the petitioner sought a declaratory judgment that the "immunity clause,"²⁶ shielding attorneys from disciplinary action for participation in the program, did not contravene article 3, section 1, of the Indiana Constitution which provides for the separation of powers among the legislative, executive, and judicial branches of government.²⁷ Article 7, section 4, provides further that the Supreme Court of Indiana has original jurisdiction over matters of attorney discipline.²⁸ Under this section, the supreme court had previously held that it is the exclusive province of the court to "regulate professional legal activity."²⁹

The court found that by declaring absolute immunity from judicial disciplinary rules, the drafters of the Act clearly overstepped the boundaries of article 3, section 1.³⁰ In an obvious attempt to escape such a ruling, the drafters had included a provision that the program did not

23. Attorney Trust Account Act, Pub. L. No. 154-1990 (H.E.A. 1044) (codified at IND. CODE § 33-20-1-1 to -9-2 (Supp. 1990)).

24. 561 N.E.2d 791 (Ind. 1990).

25. *Id.*

26. The clause provided: "An attorney is not subject to disciplinary action as a result of any action taken in accordance with this article." IND. CODE § 33-20-2-1 (1988).

27. *In re Public Law No. 154-1990*, 561 N.E.2d at 791-92. The court acknowledged that it was recognizing an "unconventional procedural process" in the resolution of the petition before it. *Id.* at 792. By separate order of June 20, 1990, the court ordered the establishment of the Indiana Attorney Trust Account Fund held in abeyance and invited any interested attorney to file a response in opposition to the petition for declaratory relief. *Id.* (The majority opinion recited that "several" responses were submitted, *id.* at 793, and Chief Justice Shepard, in his dissent, stated that "the resulting letters in opposition can be counted on one hand." *Id.* at 796.) After noting that the time for input had expired, the court stated that because the constitutionality of the immunity clause was solely a question of law, the presentation of factual evidence was not necessary and the issues were closed and ripe for adjudication. *Id.* at 792.

28. IND. CONST. art. 7, § 4.

29. *In re Public Law No. 154-1990*, 561 N.E.2d at 792 (quoting *In re Mann*, 270 Ind. 358, 361, 385 N.E.2d 1139, 1141 (1979)).

30. *Id.* at 793.

apply to any activity that was the practice of law and regulated by the judicial department of state government.³¹ The court, however, was unwilling to accept that simple declaration as valid, stating that an attorney's duties and obligations with respect to clients' funds are, by both "existing standards and past enforcement," subject to judicial regulation.³² Thus, "[t]he immunity provisions of the Attorney Trust Account Act clearly and literally attempt to limit the attorney disciplinary function of the judicial department."³³

The court thus found the Act void in its entirety,³⁴ solely as a matter of state constitutional law.³⁵ Consistent with its statement made eight months earlier that it did not have sufficient facts before it to form an opinion on the merits of such programs,³⁶ the court did not foreclose the possibility of future consideration "of new factual matters supporting review of our prior disapproval" of such programs.³⁷ Accordingly, its holding was expressly limited to the proposition that attorney discipline is exclusively a matter for the court. Thus, Indiana may yet join the position of all other states on the issue of interest on attorneys' trust accounts.

III. DISCIPLINARY CASES

A. Advertising

The United States Supreme Court delivered yet another opinion involving attorney advertising in June 1990. *Peel v. Illinois Attorney Registration and Disciplinary Commission*³⁸ involved an attorney who used a professional letterhead that carried the notations "Certified Civil Trial Specialist by the National Board of Trial Advocacy" and "Licensed: Illinois, Missouri, Arizona."³⁹ The National Board of Trial Advocacy (NBTA) "offers periodic certification to applicants who meet exacting standards of experience and competence in trial work."⁴⁰ The Commission claimed that Peel was holding himself out as a certified legal specialist in violation of the Code of Professional Responsibility. The Illinois Supreme Court agreed, concluding that the first amendment did not

31. *Id.* (citing IND. CODE § 33-20-2-2 (1988)).

32. *Id.*

33. *Id.*

34. *Id.* at 794.

35. *Id.* at 792.

36. *Id.* (citing *Indiana State Bar*, 550 N.E.2d at 314).

37. *Id.* at 794.

38. 110 S. Ct. 2281 (1990).

39. *Id.* at 2292.

40. *Id.*

protect the right to make such representations on letterhead because the public could confuse the state and the NBTA as the sources of Peel's certification and his license to practice.⁴¹ Further, the claim of certification could be interpreted as a representation of superior quality.⁴²

The United States Supreme Court reversed and held that a "lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his . . . certification as a trial specialist by the NBTA."⁴³ The subject letterhead was neither actually nor inherently misleading because the facts stated were both true and verifiable. Further, there was no finding of actual deception or misunderstanding.⁴⁴ Thus, the state's interest in avoiding potential misunderstandings was insufficient to justify a categorical ban on the use of the letterhead, and the state supreme court's inherent authority to supervise its own bar did not insulate its judgment from review for constitutional infirmity by the United States Supreme Court.⁴⁵

B. Judicial Discipline

Three cases of interest involving judicial discipline were reported during the survey period. The results varied in all three cases. Considered together, however, they may signal a more intense degree of supervision over the judiciary by the Indiana Supreme Court and a more severe level of sanctions imposed for violations.

In June of 1990, the court's opinion in *In re Boles*⁴⁶ was published. The court found that a circuit court judge violated numerous Canons of Judicial Conduct and engaged in judicial misconduct. By entering orders that he knew were contrary to law and carrying an ongoing political dispute with the county commissioners, the judge had engaged in willful misconduct in office, acted in a manner prejudicial to the administration of justice, and abused his powers so as to destroy the public's confidence in the integrity and impartiality of the judiciary.⁴⁷ The judge appeared to have been motivated by a "crusade to portray himself as a 'taxpayers' hero,'"⁴⁸ and, in the process "became completely embroiled . . . and lost all semblance of impartiality, independence, dignity and distance from public clamor."⁴⁹

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 2283.

45. *Id.*

46. 555 N.E.2d 1284 (Ind. 1990).

47. *Id.* at 1287-88.

48. *Id.* at 1288.

49. *Id.* The court stated that "[j]udges are certainly entitled to political views."

While weighing the appropriate sanctions, the court noted a mitigating factor; the charges did not involve allegations of dishonesty or criminal conduct. However, the court also exhaustively detailed the judge's other instances of past misconduct which had not resulted in sanctions.⁵⁰ This "aggravating information," was said to demonstrate that the type of misconduct before the court was "no mere aberration," and had actually gone on for years.⁵¹

Accordingly, the court said that, in approving an agreement for a sixty-day suspension without pay from the bench and the practice of law with automatic reinstatement, it was ordering the "highest sanction actually imposed by this Court in fifteen years."⁵² Furthermore, but for the judge's public apology and the Commission's recommendation of the agreement, the court "would be inclined toward a stiffer penalty."⁵³

Two months later, the supreme court decided *In re Hammond*,⁵⁴ in which a circuit court judge had engaged in misconduct both prior to taking the bench and as a sitting judge. The court held that her actions in drafting several wills while giving the impression that she was subject to influence by one of the beneficiaries was improper,⁵⁵ as was the exercise of a power of attorney for the beneficiary, a non-family member, after assuming the bench.⁵⁶

In *Hammond*, the Indiana Supreme Court showed no reluctance to impose penalties that were even more severe than the penalties imposed in *Boles*. It approved an agreement requiring suspension from the bench and bar for ninety days without pay, with automatic reinstatement.⁵⁷ In addition, the judge was barred from seeking re-election.⁵⁸

Interestingly, unlike the *Boles* decision, the court in *Hammond* spent no time weighing other "aggravating information."⁵⁹ Although it is unclear from the decision whether such information existed,⁶⁰ it is likely

Id. at 1289. However, it appears they are not free to express them on all subjects. See Indiana Commission on Judicial Qualifications, *Advisory Opinion No. 2-90*, 34 RES GESTAE 86, 95 (Aug. 1990). "A judge or candidate for judge should not publicly express personal views on the abortion issue." *Id.*

50. *In re Boles*, 555 N.E.2d at 1289-90.

51. *Id.* at 1289.

52. *Id.* at 1285. The court noted that "[i]n the past a number of judges have chosen to resign in the face of charges brought by the Commission rather than run the risk of suspension or removal." *Id.*

53. *Id.*

54. 559 N.E.2d 310 (Ind. 1990).

55. *Id.* at 312.

56. *Id.*

57. *Id.* at 312-13.

58. *Id.*

59. See *supra* notes 50-51 and accompanying text.

60. The charges were more extensive than the agreed facts; therefore, it is likely the court could have considered other information.

that, given the prohibition against re-election, the court found such an inquiry unnecessary.

The third significant case concerning judicial discipline during the survey period was *In re Sauce*.⁶¹ Sauce, a county court judge, was charged with violations of the Codes of Professional and Judicial Conduct for making ex parte contact with the judge presiding over a custody dispute involving Sauce's son. After obtaining an order granting himself custody, without notice to his ex-wife, Sauce became enraged when the wife's attorney had the order vacated.⁶² He stated to his ex-wife's new husband:

I will nut him for an *ex parte* communication. I will serve their nuts up like beef stew. Your lawyer won't get away with this because I will nut him too when this is over. I'm going to f. . . him up real bad if at all possible. I'm going to f. . . him up just like he's trying to f. . . up my kid.⁶³

Sauce was charged with willful misconduct in office, conduct prejudicial to the administration of justice, and conduct bringing the judicial office into disrepute.

The court called it "highly unethical" that Sauce used his judicial position to gain an unfair advantage in a personal case.⁶⁴ Despite the implied level of condemnation, the court approved an agreement between Sauce and the Judicial Qualifications Commission, which required only a public reprimand and which foreclosed any further disciplinary action against Sauce as a lawyer or as a judge.⁶⁵

While the *Boles* and *Sauce* cases are similar in that both respondents publicly apologized for their actions, a fact the court said was important, the cases also differ significantly. In *Boles*, the court noted that the judge was apparently motivated by a misdirected desire to serve the public good. Sauce, on the other hand, was acting out of self-interest and yet, received a lighter sanction. The Court suggested a reason for the seeming inconsistency when it noted that Sauce would not be re-elected to serve the next term, which began in sixty-seven days, and admitted that fact "played a role in [the] decision to accept only a public reprimand."⁶⁶ It also seems likely that the years of "aggravating information"⁶⁷ in *Boles* played some role in the differing results.

61. 561 N.E.2d 751 (Ind. 1990).

62. *Id.* at 753.

63. *Id.*

64. *Id.*

65. *Id.* at 754.

66. *Id.*

67. See *supra* notes 50-51 and accompanying text.

C. Conflicts of Interest

In *In re Kern*,⁶⁸ the Supreme Court of Indiana provided some insight into the court's role in the disciplinary system in a case involving conflicts of interest. Attorney Kern had represented a chiropractor who was battling what he believed were conspiracies designed to interfere with the practice of chiropractic medicine. Eventually, a grand jury issued target subpoenas to the attorney and to an investigator hired by the chiropractor because of the investigator's questionable activities in obtaining documents and information from various public offices.⁶⁹ The subpoena was later withdrawn against the attorney; however, the investigator was charged with impersonating a public servant, conversion, and theft.⁷⁰

The attorney entered his appearance for the investigator in the criminal prosecution. The prosecutor gave notice that the attorney would be a state's witness against the investigator and filed a motion to disqualify the attorney. The trial court denied the motion. The prosecutor next offered an advantageous plea bargain to the investigator if he would testify against the attorney and others. The offer was later improved to include full immunity. The investigator still refused. Once again, the prosecutor moved to disqualify the attorney, and once again the motion was denied. Subsequently, the attorney was released as a witness against the investigator.⁷¹

Ultimately, the investigator pled guilty to one charge and received a one-year suspended sentence and a \$500 fine.⁷² At the prosecutor's request, the investigator testified on the record that he consented to attorney Kern's representation.⁷³ The attorney was subsequently charged with a two-count disciplinary complaint alleging various violations of the Rules of Professional Conduct.⁷⁴ The appointed hearing officer⁷⁵ found that the attorney had violated Rule 1.7(b) which prohibits a lawyer from representing a client if the representation "may be materially limited by the lawyer's own interests, unless (1) the lawyer reasonably believes that representation of the client will not be adversely affected; and (2) the client consents after consultation."⁷⁶

68. 555 N.E.2d 479 (Ind. 1990).

69. *Id.* at 482.

70. *Id.*

71. *Id.*

72. *Id.* at 483.

73. *Id.*

74. *Id.* at 482.

75. The hearing officer was appointed according to Admission and Discipline Rule 23.

76. *In re Kern*, 555 N.E.2d at 483 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b)).

The attorney petitioned the Indiana Supreme Court for a review of the findings.⁷⁷ The court noted that the review process employed in disciplinary cases is a *de novo* examination of all matters presented, which includes an examination of both the hearing officer's report and the entire record of the case,⁷⁸ including the Disciplinary Commission's brief.

The court prefaced its review by stating that the hearing officer's assessment of the evidence and her judgment in reconciling conflicting testimony carry "great weight"⁷⁹ and are entitled to deference. Accordingly, it noted the hearing officer's finding that the attorney's own interests in the outcome of the investigator's case were both real and evident from the time the criminal investigation began and continued throughout the proceedings.⁸⁰

The attorney denied, however, that there was any conflict of interest in his continued representation even after the offer of immunity. He maintained that he communicated all offers and presented a vigorous defense. He claimed that since both he and the investigator knew that he had not directed the investigator's activities, he could have no direct interest in the investigator's case and thus there was no conflict with his interests.⁸¹

The court found the attorney's arguments unpersuasive, noting that he was always aware that he was a primary focus of the investigation and that the investigator could "walk away" from the criminal proceedings if he would implicate the attorney.⁸² Clearly, the attorney's own interests were in direct conflict with those of his client, who was entitled to objective advice. The attorney's own subjective interpretation of the incident and his determination that a conflict did not exist only further displayed his "distorted perception of what was at stake."⁸³

The attorney also argued that, if a conflict existed, the investigator waived it as permitted by Rule of Professional Conduct 1.7(b).⁸⁴ The court noted that the Comment following the Rule provides insight as to the effect of consultation and consent in conflict situations:

It states that when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot provide representation

77. *Id.* at 480.

78. *Id.*

79. *Id.*

80. *Id.* at 483.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

on the basis of the client's consent. No disinterested lawyer could ethically conclude that . . . [the investigator] should be represented by the very person against whom the Prosecution was seeking information in exchange for . . . [the investigator's] immunity. Respondent's belief that his continued representation of . . . [the investigator] under these circumstances would not be affected by Respondent's own interests is patently unreasonable.⁸⁵

The attorney maintained that because the trial court denied the prosecutor's attempts to disqualify him, he should not later be subjected to disciplinary review. The supreme court disagreed, however, stating that the discipline of an Indiana Bar member is determined independently from any other proceeding, and the trial court's failure to grant the motion to disqualify was not determinative of whether the attorney had breached the Rules of Professional Conduct.⁸⁶

The court was unswayed by the fact that the investigator consented to the attorney's representation. Rather, it focused exclusively on the reasonableness of the attorney's belief that no conflict existed, and held that reasonableness must be judged within the context of the facts existing at the time the conduct occurred.⁸⁷ The fact that the investigator's and the attorney's interests were diametrically opposed during the representation convinced the court that the attorney was entirely unreasonable in his belief that the investigator's representation would not be adversely affected. Instead, the court found that such a belief was "telling evidence of the risk and poor judgment that can result from the loss of objectivity" which is "absolutely essential in the attorney-client relationship."⁸⁸

Thus, the Indiana Supreme Court established in *Kern* that client consent is not enough to avoid a conflict of interest when the lawyer lacks a reasonable belief that his representation of the client will not be adversely affected. The test is an objective one. If a disinterested lawyer would conclude that a client should not agree to waive the conflict, the lawyer involved cannot go forward on the basis of consent.

*In re Herbert*⁸⁹ is another recent case that strongly suggests that the supreme court is becoming increasingly reluctant to excuse conflicts of interest on the basis of consent and waiver. In *Herbert*, disciplinary proceedings were brought against an attorney who prepared a will for a client that named the attorney as both personal representative and as

85. *Id.* at 483-84.

86. *Id.* at 484.

87. *Id.*

88. *Id.*

89. 553 N.E.2d 130 (Ind. 1990).

the beneficiary of a substantial bequest. The attorney was charged with violating Rule 5-101(A) of the Code of Professional Responsibility.⁹⁰

Rule 5-101(A) provided: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."⁹¹

Although the attorney had advised the client to seek independent counsel, he did not explain to the client that by including a bequest to himself in the will he prepared for her, the exercise of his independent professional judgment could be affected by his own interests.⁹² The court stated that Rule 5-101(A) required this explanation and imposed a public reprimand.⁹³ The court further noted that Rule 1.8(c) of the Rules of Professional Conduct "clarifies any misconception as to the intent of this prohibition" and now provides that "[a] lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee."⁹⁴

Rule 1.8(c) is, however, more than just a clarification of the old requirement of full disclosure. Its terms completely prohibit an attorney from preparing such an instrument. Full disclosure is no remedy for conflicts under the new rule. As the Comment to Rule 1.8 explains:

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a Will or conveyance, however, the client should have the detached advice that another lawyer can provide.⁹⁵

Thus, the new Rules appear to make less of an accommodation for waiver of, and consent to, conflicts of interest. The cases interpreting these Rules also reflect this change. As the court in *Herbert* stated: "The free exercise of independent professional judgment on behalf of a client is a cornerstone of any attorney-client relationship. The subtle

90. *Id.* at 131. The Code of Professional Responsibility was superceded by the Rules of Professional Conduct on January 20, 1987.

91. MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 5-101(A) (1983).

92. *In re Herbert*, 553 N.E.2d at 131.

93. *Id.*

94. *Id.*

95. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.8 comment (West 1987).

pressures inherently present when a lawyer represents conflicting interests erode away the element of trust which must exist in such a relationship.”⁹⁶

*In re Matz*⁹⁷ involved conflicts of interest between clients as well as between the attorney and the client. In *Matz*, an inexperienced attorney had previously represented a client on two occasions; first, in acquiring complete ownership of a business and later, in protecting its trademark.⁹⁸ Upon settlement of the last matter, the attorney believed that he no longer represented the client. The client, however, believed to the contrary.

While the client was out of state, the attorney consulted with an employee of the business about forming a competing business. His subsequent investment in that competing business and conversations with other employees resulted in their defection from the client’s company. Ultimately, in reliance on the attorney’s unfavorable assessment of the client’s business, the client sold it to the competing business established by the attorney. He believed the attorney still represented him at the time.⁹⁹

The court found misconduct, and approved an agreed sanction of public reprimand, citing the attorney’s inexperience as a mitigating circumstance.¹⁰⁰ The court said that the attorney’s conduct brought into question his “understanding of the duties and responsibilities incumbent upon an attorney representing the interests of another.”¹⁰¹ Although the *Matz* decision did not expressly address the pitfalls involved in terminating representation, it is clear that the attorney’s belief about whether the attorney-client relationship exists is not determinative.

The Rules of Professional Conduct do not clearly provide what constitutes the formation or the termination of the attorney-client relationship. Instead, the Rules primarily address the duties that arise while the relationship is in existence. The preamble to the Rules states that “for purposes of determining the lawyer’s authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists.”¹⁰² Thus, the authors of the Rules deferred to the courts to establish on a case-by-case basis when the relationship exists because “[w]hether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.”¹⁰³

96. *In re Herbert*, 553 N.E.2d at 131.

97. 560 N.E.2d 66 (Ind. 1990).

98. *Id.* at 67.

99. *Id.*

100. *Id.*

101. *Id.*

102. INDIANA RULES OF PROFESSIONAL CONDUCT preamble (West 1990).

103. *Id.* The preamble further states that there are “some duties,” such as con-

Thus, it is necessary to look to case law, rather than the Rules, to determine whether the relationship and its concomitant duties exist. In Indiana, it is clear that the existence of the attorney-client relationship does not depend on the existence of a written contract.¹⁰⁴ In *Newman v. Kizer*,¹⁰⁵ the Indiana Supreme Court held that although only one of two plaintiffs actually contracted for the services of an attorney, an attorney-client relationship was also created with the plaintiff who did not expressly contract because he "freely recognized and treated the attorney as his representative throughout the entire proceedings."¹⁰⁶ Thus, the absence of a written contract does not preclude the creation of an attorney-client relationship if the putative client regards the attorney as his representative throughout the subject transaction.¹⁰⁷ Obviously, the inquiry is entirely fact-sensitive, and unless the attorney acted conclusively to make a record that he did not represent someone, he will be at the mercy of the "client's" testimony.¹⁰⁸

fidentiality under Rule 1.6, that "may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established." *Westinghouse Elec. Corp. v. Kerr-McGee*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) (mere consultation was sufficient to create a fiduciary relationship requiring confidentiality if the purpose of the client's approach was to seek legal advice from the attorney in his professional capacity).

104. *Newman v. Kizer*, 128 Ind. 258, 260, 26 N.E. 1006, 1007 (1891). A minority of jurisdictions require an express contract in order to create an attorney-client relationship. See *Keller v. LeBlanc*, 368 So. 2d 193 (La. Ct. App. 1979). And, one jurisdiction, while stating that the contract may be express or implied, held that a retainer, an offer to retain, or a fee paid is required in order to create an attorney-client relationship. See *Zych v. Jones*, 84 Ill. App. 3d 647, 406 N.E.2d 70 (1980). An attorney may also have a duty to a third party beneficiary of a contract for legal services. A third party beneficiary contract arises when "two parties enter an agreement with the intent to confer a direct benefit on a third party, allowing the third party to sue on the contract despite the lack of privity." *Hermann v. Frey*, 537 N.E.2d 529, 530 (Ind. Ct. App. 1989) (citing *Flaherty v. Weinberg*, 303 Md. 166, 492 A.2d 618, 622 (1984)). In *Hermann*, a sole beneficiary of an estate recovered against an attorney appointed to represent the estate. The other situations in which courts are most likely to impose liability, regardless of an attorney-client relationship, are will drafting and title examination. Friedman, *The Creation of the Attorney-Client Relationship: An Emerging View*, 22 CA. W.L. REV. 209, 215 (1986).

105. 128 Ind. 258, 26 N.E. 1006 (1891).

106. *Id.* at 260, 26 N.E. at 1007.

107. The supreme court has also ruled that the attorney-client relationship may exist if an attorney "minister[s] to the legal problems of another." *In re Perello*, 270 Ind. 390, 398, 386 N.E.2d 174, 179 (1979). In *Perello*, an attorney was held in contempt for continuing to practice law in violation of a suspension by the Supreme Court Disciplinary Commission. The Court stated that the "[u]ndertaking to minister to the legal problems of another creates an attorney-client relationship without regard to whether the services are actually performed by the one so undertaking the responsibility or are delegated or subcontracted to another." *Id.* It should be noted that the *Perello* court may not have intended its definition of the attorney-client relationship to apply in all situations. The court was dealing with a difficult disciplinary problem and its primary holding was that the act of delegating legal work to another constituted the "practice of law." *Id.*

108. See *Board of Overseers of Bar v. Dineen*, 500 A.2d 262 (Me. 1985), *cert.*

If the person claiming to be a client subjectively believes that he consulted the attorney in a professional capacity and is at all credible, a court is likely to find that the attorney entered into an attorney-client relationship.¹⁰⁹ At the least, a duty of confidentiality under Rule of Professional Conduct 1.6 may arise, which will in turn prohibit the attorney from acting in an adverse capacity.

Although the attorney's inexperience may have been a mitigating factor in *Matz*, it is the client's inexperience that may cause a court to conclude that the client's subjective belief that an attorney-client relationship existed was justified. Under such circumstances, even disclosure that the attorney represents another party in the case or transaction may not prohibit the existence of the relationship.¹¹⁰

Judging by the sanctions imposed by the Indiana Supreme Court in *In re Sabato*,¹¹¹ inexperience was not a plea the attorney could have made in defense of his actions in representing the interests of several clients in the same transactions. Indeed, the complicated nature of the various real estate sales, corporate entity formations, financing plan structuring, partnership dissolutions, settlement negotiations, and, ultimately, claims against his own former clients over a transaction in which he had represented those same clients, led the court to conclude that the attorney intentionally damaged his clients.¹¹²

denied, 476 U.S. 1141 (1986). In *Dineen*, an attorney was suspended for six months for representing both parties to a divorce proceeding. He maintained he did not represent the wife, but testified that he did not take any steps to prevent her from believing that he did because he did not think it was necessary. The wife had a serious problem with alcohol abuse and while the attorney had made some statements that might have given rise to doubts about whom he represented, she did not grasp or understand his mild disclaimers.

109. On April 30, 1991, after the end of the time period covered by this Article, the Court of Appeals for the First District delivered its opinion in *Hacker v. Holland*, 570 N.E.2d 951, 955 (Ind. App. 1991), wherein the court held: "A would-be client's unilateral belief cannot create an attorney-client relationship." Thus, the court, at long last, moved to a more objective standard of proof on the issue. The court stated that because the relationship is necessarily a consensual one, the putative client must demonstrate that "both attorney and client have consented to its formation." *Id.* Publishing schedules do not allow for further elaboration on this decision; however, it is commended to the reader's attention.

110. See *In re Petrie*, 154 Ariz. 295, 299-300, 742 P.2d 796, 800 (1987); *In re Irons*, 684 P.2d 332, 339 (Kan. 1984). A "client's" age, coupled with a lack of experience with the legal system, are factors that may persuade a court that an attorney-client relationship existed. *Irons*, 684 P.2d at 340. According to the recent Indiana case of *Hacker v. Holland*, 570 N.E.2d 951, if the attorney has issued a written disclaimer, either separately or incorporated into the documents evidencing the subject transaction, which states that he is acting "solely" on behalf of a specific party's interests *and* advising all others to seek independent legal counsel to protect their own interests, the issue of whether the attorney-client relationship existed with those others will be conclusively foreclosed. *Id.* at 956.

111. 560 N.E.2d 62 (Ind. 1990).

112. *Id.* at 65.

Calling the matter a "total financial disaster," the court noted that all of the individuals who relied on the attorney were harmed.¹¹³ The financial outcome of the transaction was not, however, the test the court used to measure ethical standards.¹¹⁴ Noting that it was possible that economic factors could have produced the same result even if all parties had independent representation, or that in a different financial atmosphere all may have benefited, the court stated that the issue of ethical representation was not simply a question of damages.¹¹⁵

Where there are conflicting interests, each party possessing a unique stake in the outcome of a transaction deserves independent professional representation. As displayed in this case, this cannot be accomplished merely by identifying a common purpose and then working toward such objective. Each party deserves individual advice not tempered by general advice for the good of all.¹¹⁶

Clients must have confidence that their attorney works only for them in order to assure faith in the legal profession. Client confidence, said the court, "is the essence of the rules and . . . the failure of the Respondent."¹¹⁷ Accordingly, the attorney was suspended from practice for six months.¹¹⁸ Although *Sabato* is an extreme example of potential ethical violations inherent in representing clients with conflicting interests, it should be noted that some, although certainly not all, of the conflicts involved in that case could have been avoided by making full disclosure and obtaining consent, as is permitted in some circumstances by the Rules of Professional Conduct.¹¹⁹ The *Kern* decision serves as a reminder, however, that disclosure and consent are not panaceas for all the ills conflicts can create.¹²⁰

D. Disclosure and Candor to Tribunals, Dishonesty, Deceit, and Misrepresentation

*In re Steininger*¹²¹ concerned an attorney charged with engaging in conduct involving moral turpitude, dishonesty, fraud, deceit or misrepresentation, conduct prejudicial to the administration of justice, and

113. *Id.*

114. *Id.*

115. *Id.* at 65-66.

116. *Id.* at 65.

117. *Id.* at 66.

118. *Id.*

119. See *supra* note 76 and accompanying text.

120. *Kern*, 560 N.E.2d at 66.

121. 546 N.E.2d 823 (Ind. 1989).

conduct adversely reflecting on the attorney's fitness to practice law.¹²² The attorney purchased some real property. Before recording the deed, he had the legal description, which had been prepared by the seller's attorney, altered without the seller's knowledge or approval. Later, after realizing that the recorded description was incorrect, the attorney, again without the consent of the seller, obtained the recorded deed, detached the legal description as filed, reattached the legal description originally prepared by the seller's attorney, and re-recorded the deed.

The Disciplinary Commission disagreed with the hearing officer's recommendation for a private reprimand and maintained that the character of an act involving the alteration of a recorded document suggested dishonesty and justified more severe sanctions.¹²³ The court disagreed and noted that both parties benefited by the attorney's actions, and the alteration did not appear to be motivated by evil design.¹²⁴ Even though the attorney was "wrong" in taking a "short-cut," his act was not found to "rise to the level which warrants a severe sanction."¹²⁵ Accordingly, the court held that a public reprimand and admonishment were sufficient.¹²⁶

The supreme court's leniency in *Steininger* is interesting in light of its decision two months earlier in *In re Crapo*.¹²⁷ In *Crapo*, the attorney was also charged with altering a document, although his actions involved forgery and false notification.¹²⁸

The attorney had filed a petition to modify visitation and support in a Marion County Superior Court. He represented that the petition was signed by his client and notarized by himself. In fact, the client had not signed the petition. Although he had reviewed and approved it, the client had left the attorney's office on the day of filing without remembering to sign the document. The client could not be reached by telephone. Wishing to expedite the contemplated proceeding, the attorney forged the client's signature and fraudulently represented that he, as a Notary Public, had witnessed the signing.¹²⁹

The supreme court concluded that the attorney committed a criminal act which reflected adversely on his honesty, trustworthiness, and fitness as a lawyer because he engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation.¹³⁰ Noting that the attorney's acts of forgery

122. *Id.* at 823-24.

123. *Id.* at 824.

124. *Id.*

125. *Id.*

126. *Id.*

127. 542 N.E.2d 1334 (Ind. 1989).

128. *Id.* at 1334-35.

129. *Id.*

130. *Id.* at 1335.

and false notarization warranted "severe scrutiny," the court approved an agreement between the Disciplinary Commission and the attorney for a ninety-day suspension with automatic reinstatement.¹³¹ When contrasted with the *Steininger* sanctions, *Crapo* arguably provides an incentive to avoid such agreements in cases involving similar facts.

Of course, if an agreement is rejected as an alternative, the question of sanctions is left entirely to the court. Some insight into the supreme court's method of analysis in evaluating and assessing appropriate sanctions was provided in a disciplinary case decided in July 1990 and discussed below. A review of that case and its predecessors helps somewhat in an attempt to understand how seemingly similar factual circumstances, as in *Steininger* and *Crapo*, can result in sanctions of significantly different degrees of severity.

E. Misappropriation of Funds

*In re Glanzman*¹³² involved an attorney who kept cashing social security checks erroneously paid to his deceased mother well after her death. In total, he received and spent for his own use \$13,784.00 in benefits. After he was charged with a crime, but before he successfully plea bargained the charge down to converting \$100.00 belonging to the government, he repaid the full amount.¹³³

The assessment of the appropriate sanctions, the court said, involved: "an examination of the nature of the incident, the specific acts of the respondent, the impact on the public, [the] court's responsibility to preserve the integrity of the Bar, and the risk to which the public will be subjected if the respondent is permitted to continue in the profession."¹³⁴

131. *Id.*

132. 555 N.E.2d 1295 (Ind. 1990).

133. *Id.*

134. *Id.* at 1296. This same basic list of factors has been repeated by the court over the last several years, with occasional modifications or deletions of no apparent significance. For example, of the three cases cited by the court in *Glanzman* in support of the proposition that the appropriate analysis involves the factors recited in the text above, *In re Olsen*, 547 N.E.2d 849 (Ind. 1989); *In re Hampton*, 533 N.E.2d 122 (Ind. 1989), and *In re Moerlein*, 520 N.E.2d 1275 (Ind. 1988), the *Olsen* case completely deleted the factor of "the impact on the public." See *Olsen*, 547 N.E.2d 849, 850. Because that factor was resurrected by the court in *Glanzman*, apparently no significance should be attributed to its absence from *Olsen*. Other cases reciting the relevant factors, with minor variations, are *In re Briggs*, 502 N.E.2d 890 (Ind. 1987); *In re Stanton*, 492 N.E.2d 1056 (Ind. 1986); *In re Duffey*, 482 N.E.2d 1137 (Ind. 1985); *In re Hailey*, 473 N.E.2d 616 (Ind. 1985); *In re Ewers*, 467 N.E.2d 1184 (Ind. 1984); *In re Aungst*, 467 N.E.2d 698 (Ind. 1984).

Applying that analysis, the court found the attorney's actions to be "abhorrent" and noted that if he had been convicted of converting the full amount, he could have been sentenced to up to ten years in prison.¹³⁵ After noting that it would be "a travesty to tolerate the entrustment of private legal interests to a person who has so grossly abused the public,"¹³⁶ the court imposed the strongest sanction available and disbarred the offending attorney.¹³⁷

IV. RULE 11 AND FRIVOLOUS CLAIMS

When the United States Supreme Court delivered its opinion in *Cooter & Gell v. Hartmax Corp.*¹³⁸ in June 1990, it put further bite into Rule 11 of the Federal Rules of Civil Procedure.¹³⁹ The defendants in *Cooter* had moved to dismiss the underlying complaint and for Rule 11 sanctions.¹⁴⁰ The plaintiffs subsequently filed a notice of voluntary dismissal of the complaint under Rule 41(a)(1)(i).¹⁴¹ Nonetheless, the trial court held that the plaintiffs' prefiling inquiries were grossly inadequate and imposed monetary sanctions on the attorneys and their client.¹⁴² The Supreme Court affirmed and held that a voluntary dismissal of an ill-advised complaint does not divest a trial court of jurisdiction over a Rule 11 motion.¹⁴³

The Indiana Court of Appeals in *Duke v. Wynne*¹⁴⁴ expanded on two previous decisions, *Kahn v. Cundiff*¹⁴⁵ and *General Collections, Inc. v. Decker*,¹⁴⁶ which construed Indiana's Frivolous Claim Statute.¹⁴⁷ The court noted that ordinarily an appeal of an award or denial of fees under the statute presents mixed questions of law and fact.¹⁴⁸ Accordingly, a trial court's factual findings are reviewed under the clearly erroneous standard while its legal conclusions are reviewed *de novo*.¹⁴⁹

135. *Glanzman*, 555 N.E.2d at 1296.

136. *Id.*

137. *Id.*

138. 110 S. Ct. 2447 (1990).

139. The Court specifically noted that Rule 11, which provides that an attorney's signature on a pleading constitutes a certificate that he has read the pleading and believes it to be well grounded in fact and in law, also provides that the Court "shall" impose appropriate sanctions for violations. *Id.* at 2449 (citing FED. RULE CIV. P. 11).

140. *Id.* at 2452.

141. *Id.*

142. *Id.* at 2452-53.

143. *Id.* at 2455.

144. 552 N.E.2d 504 (Ind. Ct. App. 1990).

145. 543 N.E.2d 627 (Ind. 1989).

146. 545 N.E.2d 18 (Ind. Ct. App. 1989).

147. IND. CODE § 34-1-32-1 (1988).

148. *Duke*, 552 N.E.2d at 505.

149. *Id.*

Unlike *Kahn* and *General Collections*, however, the court noted that the case before it did not require factual analysis of the attorney's actions during the development of the case.¹⁵⁰ Rather, the actions that warranted sanctions were matters revealed in the record or which depended upon the development of case law as the case was unfolding.¹⁵¹ Because it was clear from the record that the attorney was informed by the trial judge of a new case directly contrary to his position, but continued to advocate a contrary theory all the way through appeal with no attempt to distinguish the contrary precedent, the court of appeals imposed sanctions.¹⁵² The attorney was not able to make a good faith, rational argument for an extension, modification, or reversal of existing law and continued to litigate the point after the claim became frivolous.¹⁵³

Although the attorney had argued for an extension of the law, the court said that not all arguments can be made in good faith when recent case law, directly on point, forecloses such an extension.¹⁵⁴ This conclusion was underscored by the attorney's failure to cite or attempt to distinguish the contrary case on appeal.¹⁵⁵

V. PROFESSIONAL LIABILITY

A. Attorneys' Rights to Fees

Judge Buchanan of the Second District Court of Appeals authored two opinions in April and May of 1990 which, when coupled with a November 1990 decision by Judge Robertson of the First District, greatly clarify the somewhat murky state of the law on an attorney's rights and responsibilities in the payment of fees. In *Community State Bank Royal Center v. O'Neill*,¹⁵⁶ the court held that when an attorney is employed pursuant to an oral employment contract, the statute of limitations in an action for fees earned does not start to run with the conclusion of the matter the attorney was employed to handle, but rather begins to run when the attorney submits the first bill. Although the applicable statute, Indiana Code section 34-1-2-1.5, provides that an action must be brought within two years of the date of "the act or omission complained of," the court found that the act the attorney

150. *Id.*

151. *Id.* at 505-06.

152. *Id.* at 506.

153. *Id.* at 507.

154. *Id.*

155. *Id.*

156. 553 N.E.2d 174 (Ind. Ct. App. 1990).

complained of was the failure of the client to pay the bill.¹⁵⁷ Because payment was not due until demand was made, no breach occurred until the bill was submitted and the client refused to pay. Thus, even though the attorney's claim for payment was not filed for more than two years after the last services were rendered, it was still timely because it occurred less than two years after the client had refused to pay.¹⁵⁸

The court also found that an award of prejudgment interest was proper even though the client disputed the amount of fees and the trial court did not agree with the attorney on the hourly rate he claimed.¹⁵⁹ The client contended that because it contested the value of the services, the amount owed was not ascertainable in accordance with fixed rules of evidence and known standards of value; thus, prejudgment interest was not recoverable.¹⁶⁰ Also weighing against an award of prejudgment interest was the fact that the trial judge applied a lower hourly rate to the work than that claimed by the attorney.

The court of appeals found that neither of these facts was an obstacle to an award of prejudgment interest. The test, it stated, was not whether the parties have mutually fixed the amount in dispute, but rather "whether the principle amount is ascertainable by mere computation."¹⁶¹ Because the attorney's evidence of the number of hours he spent on the client's matter was not disputed, the trial court's disagreement about an appropriate rate and the client's disagreement with the value of the services did not alter the fact that the damages were ascertainable by computation.¹⁶² Furthermore, the court noted that the trial court's determination of fees was guided by fixed rules of evidence and known standards of value because Rule 1.5(a) of the Rules of Professional Conduct establishes the guidelines for determining an appropriate award of attorney's fees.¹⁶³ Rule 1.5(a) provides:

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

157. *Id.* at 177 (citing IND. CODE § 34-1-2-1.5 (1988)).

158. *Id.*

159. *Id.* at 177-78. The attorney claimed \$45,000 in fees for 288 hours of work.

160. *Id.*

161. *Id.* at 177.

162. *Id.* at 177-78.

163. *Id.* at 178.

3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent.¹⁶⁴

The court noted that the attorney had explicitly relied upon this rule and presented evidence on each factor.¹⁶⁵ Thus, the damages awarded were ascertainable by computation in accordance with fixed rules of evidence and known standards of value; therefore, prejudgment interest was appropriate.¹⁶⁶ The client prevailed, however, on its objection that the interest should not be calculated from the date of the last service rendered, which was eight months prior to the receipt of the attorney's first bill. Because payment was not due until it was demanded, the court held that prejudgment interest should not begin to run until that date.¹⁶⁷

Less than a month after *O'Neill*, Judge Buchanan wrote the opinion in *Bennett v. NSR, Inc.*,¹⁶⁸ which clarified other issues arising when an attorney is engaged in a fee dispute with a client. Attorney Bennett had previously represented NSR but had not been paid. In a previous action, Bennett had brought suit for his fee.¹⁶⁹ In the action on appeal, NSR sought from Bennett the return of documents and records entrusted to him which NSR needed in litigation with a third party. The trial court in the latter action had issued a subpoena duces tecum to Bennett for the production of the documents and Bennett resisted, responding first with a motion to modify the subpoena and asserting an attorney's retaining lien over the documents and later with a motion to quash the subpoena.¹⁷⁰ Both motions were denied.¹⁷¹

On appeal, NSR argued that if such a lien existed, it should be limited to the lawyer's work product alone and not apply to the documents and records of the client.¹⁷² The court of appeals disagreed and concluded

164. *Id.* (citing RULES OF PROFESSIONAL CONDUCT RULE 1.5(a)).

165. *Id.*

166. *Id.*

167. *Id.*

168. 553 N.E.2d 881 (Ind. Ct. App. 1990).

169. *Id.* at 881.

170. *Id.* at 882.

171. *Id.*

172. *Id.* at 882-83.

that the attorney should not be required to return any of the documents and records subject to this retaining lien unless he was given security for the value of his lien.¹⁷³ The court minimized the significance of its conclusion, even as it acknowledged that it was unprecedented in Indiana law, by stating that in recognizing such a lien "lawyers are merely afforded the same advantage enjoyed by workmen who labor on behalf of others."¹⁷⁴

Actually, prior law was less than clear concerning when and to what extent a civil attorney may refuse to return an ex-client's property when confronted with a subpoena. The Indiana Supreme Court had held in *Shannon v. Hendricks Circuit Court*¹⁷⁵ that an attorney had a right to retain his fees out of the monies he had received as his client's share of a property settlement, which had been recovered by his aid and through his efforts as her attorney.¹⁷⁶ The court suggested in dictum that an attorney also has a right to retain a client's documents or other property that comes into the attorney's possession professionally until he is paid for his services.¹⁷⁷ While citing *Shannon*, the court of appeals in *Bennett* acknowledged that Indiana had not previously decided whether an attorney could quash or modify a subpoena duces tecum arising out of litigation between the client and a third party because of a retaining lien held on the subject matter of the subpoena.¹⁷⁸

The court distinguished the case of *McKim v. State*¹⁷⁹ in *Bennett* on the grounds that it was a criminal case and "wholly inopposite."¹⁸⁰ The more important distinction, however, seems to be that the attorney in *McKim* did not assert a lien. There, the attorney was appointed to defend McKim, which he did, through appeal to the supreme court, which McKim lost. Upon losing, McKim wrote the attorney to inform him of his intention to sue him for malpractice and demanded all documents pertaining to his case. The attorney agreed to provide them only on the condition that McKim pay in advance for the copying costs. McKim then sought a court order compelling their production and claimed he needed the documents in order to institute post-conviction proceedings.¹⁸¹ The trial court found for the attorney and McKim appealed.¹⁸²

173. *Id.* at 882.

174. *Id.*

175. 243 Ind. 134, 183 N.E.2d 331 (1962).

176. *Id.* at 139, 183 N.E.2d at 333.

177. *Id.*

178. *Bennett*, 553 N.E.2d at 882 (citing *Shannon*, 243 Ind. 134, 183 N.E.2d 331 (1962)).

179. 528 N.E.2d 484 (Ind. Ct. App. 1988).

180. *Bennett*, 553 N.E.2d at 883.

181. *McKim*, 528 N.E.2d at 485.

182. *Id.*

McKim's motion was filed pursuant to Indiana Code section 34-1-60-10 that provides:

When an attorney, on request, refuses to deliver over money or papers to a person from whom or for whom he has received them, in the course of his professional employment, whether in an action or not, he may be required, after reasonable notice, on motion of any party aggrieved, by an order of the court in which an action, if any, was prosecuted or if no action was prosecuted, then by the order of any court of record, to do so, within a specified time, or show cause why he should not be punished for contempt.¹⁸³

The court of appeals found that the granting of such a motion was "not discretionary" with the trial court.¹⁸⁴ Upon motion, it stated, "[T]he trial court shall require an attorney to deliver all papers . . . to which the client is entitled."¹⁸⁵ The court found no condition of prepayment in the statute.¹⁸⁶ The trial court has discretion to determine which of the many papers an attorney accumulates during the course of a case must be turned over to the client.¹⁸⁷

Thus, *Shannon* arguably gave attorneys the right to retaining liens; however, *McKim*, which involved no lien, established the client's right to his documents pursuant to a statute that makes no exceptions for liens. Until *Bennett*, no case had attempted to balance lien rights against a subpoena duces tecum issued to protect the client's right to litigate with a third party.

Other jurisdictions have differed on the issue, and the Rules of Professional Conduct provide little, if any, specific guidance. Rule 1.16(d) merely states:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client *to the extent permitted by other law*.¹⁸⁸

183. *Id.* (citing IND. CODE § 34-1-60-10 (1988)).

184. *Id.* at 486.

185. *Id.*

186. *Id.*

187. *Id.*

188. RULES OF PROFESSIONAL CONDUCT Rule 1.16(d) (West 1986) (emphasis added).

Until *Bennett*, no "other law" existed in Indiana to enable a lawyer to precisely define his rights when confronted by a subpoena duces tecum. Indeed, other states have found the assertion of retaining liens to be "unethical and illegal."¹⁸⁹ The *Bennett* opinion, however, glossed over the contrary precedents and, with an interesting bit of slight of hand, noted that the Indiana Supreme Court has "exclusive jurisdiction of discipline of members of the bar . . . and until it sees fit to change the existing law on the subject, the retaining lien stands."¹⁹⁰ Since *Bennett* was unprecedented in Indiana, it is the existing law on the subject. The fact that a court of appeals decision is binding precedent unless reversed by the supreme court does not necessarily demonstrate that a reasoned basis exists for a decision that elevates the right of an attorney to payment over the right of an ex-client to the return of the client's own property, which is needed to wage other litigation successfully.

In fact, there are significant differences between "workmen who labor on behalf of others" and attorneys. The most obvious and perhaps most significant one is that attorneys are in a fiduciary relationship with their clients. They must occupy a position of trust and confidence to function effectively and, it is precisely that trust which allows attorneys to come into possession of their client's property.

The justification for *Bennett* may lie in its balancing of interests between attorney and client. Attorneys may now assert the right to retain "documents, money, or other property which comes into [their] hands . . . professionally" until their fees are paid or until they are given security for the value of their lien.¹⁹¹ Allowing the client to obtain the property if he or she posts security may somewhat diminish the coercive effect of the lien; however, it is a compromise that reflects the sensitive nature of the relationship which allowed the attorney to come into possession of the property. The client is allowed to regain his or her property and the attorney is given assurance that he or she will be paid if a judgment is obtained.

Thus, *Bennett* clears the way for attorneys to take more aggressive action to collect their fees. Following the Rules of Professional Conduct, an attorney may now know to what extent retention of clients' documents is permitted "by other law."¹⁹² There are, however, other dangers to avoid. Once the ex-client has posted security, the attorney must still pursue a judgment. Perhaps the most predictable response from an ex-client who has refused to pay an attorney's bill is a counterclaim for malpractice seeking damages equal to or in excess of the fee.

189. *Bennett*, 553 N.E.2d at 884.

190. *Id.*

191. *Id.* at 882.

192. See *supra* note 187 and accompanying text.

The third case in the recent trilogy throws some light on the type of action a discharged attorney seeking compensation may pursue. In *Estate of Forrester v. Dawalt*,¹⁹³ the attorney had been retained to handle an estate. He entered into an oral contract with the personal representative whereby he was paid \$15,000.00 in advance as a fixed fee for his services. After performing less than thirty hours of service, the attorney was discharged without cause.

The trial court awarded the attorney the full value of the contract.¹⁹⁴ The estate appealed, arguing that the attorney was only entitled to the reasonable value of his services actually rendered under a theory of *quantum meruit*. The Court of Appeals agreed and reversed and remanded for a hearing concerning the value of the attorney's services actually rendered.¹⁹⁵ The court quoted Rule of Professional Conduct 1.16(d) and its official comment:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . *refunding any advance payment of fee that has been earned*. (Emphasis added)

A pertinent part of the official commentary to the above rule reads as follows:

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.¹⁹⁶

The court agreed with authority from other jurisdictions¹⁹⁷ which posited that "the elements of trust and confidence endemic in an attorney-client relationship add a dimension to the attorney employment agreement beyond the express terms of the contract."¹⁹⁸ Accordingly, contract rights must yield to the court's inherent and statutory power to regulate the practice of law, including the charging of fees.¹⁹⁹ Non-refundable retainers, said the court, can "impose a chilling effect" upon a client's unfettered right to freely discharge an attorney, and may operate to

193. 562 N.E.2d 1315 (Ind. Ct. App. 1990).

194. *Id.* at 1316.

195. *Id.* at 1318.

196. *Id.* at 1316 (quoting RULES OF PROFESSIONAL CONDUCT RULE 1.16(d) and comment).

197. *Jacobson v. Sassoner*, 122 Misc. 2d 863, 474 N.Y.S.2d 167 (1983); *Fox & Associates Co., L.P.A. v. Pordon*, 44 Ohio St. 3d 69, 541 N.E.2d 448 (1989).

198. *Estate of Forrester*, 562 N.E.2d at 1316-17.

199. *Id.* at 1317.

hold the client "hostage" to the attorney despite a loss of trust or confidence.²⁰⁰ Therefore, when an attorney is discharged, "with or without cause," his remedy is limited to the value of his services before discharge on the basis of *quantum meruit*.²⁰¹

The attorney involved in *Estate of Forrester* obviously faced some difficulty on remand because, as the court noted, he had kept no time records due to the fixed fee arrangement.²⁰² The lesson for Indiana lawyers is clear. Even if employment is by fixed fee, careful records should be kept in anticipation of the necessity of having to prove the value of services actually rendered.

B. Statute of Limitations for Malpractice Based on Constructive Fraud

Despite the fact that the court of appeals stated in a June 1990 citation²⁰³ that transfer has been denied in the 1989 case of *Sanders v. Townsend*,²⁰⁴ that case is, in fact, still pending transfer. Hearing was held by the supreme court on March 26, 1990, and no ruling has yet been made. That case is potentially significant to attorneys practicing in Indiana because the current court of appeals's decision threatens to lengthen the statute of limitations for attorney malpractice or, at least, substantially confuse the issue.

Sanders involved a malpractice case by a client against her attorney. The court of appeals reversed summary judgment against the client and found that the attorney, in recommending an economically advantageous settlement, may have imposed his will upon his client who wished to proceed to trial regardless of the merits of her case and the advisability of the settlement.²⁰⁵ Thus, even though the court affirmed the summary judgment in favor of the attorney on the claim of negligence, because the client could not prove damages, it reversed the trial court and remanded the case for trial on the issue of constructive fraud.²⁰⁶

The court defined constructive fraud as any breach of a duty arising from a confidential or fiduciary relationship when the party at fault, without any fraudulent intent, gains an advantage at the expense of one to whom he or she owes such a duty.²⁰⁷ The elements of the tort are:

200. *Id.*

201. *Id.* at 1317-18. The court disregarded, as out-dated, the 1898 Indiana Supreme Court case *French v. Cunningham*, 149 Ind. 632, 49 N.E. 797 (1898).

202. *Estate of Forrester*, 562 N.E.2d at 1315.

203. *Medtech Corp. v. Indiana Ins. Co.*, 555 N.E.2d 844, 848 (Ind. Ct. App. 1990).

204. 509 N.E.2d 860 (Ind. Ct. App. 1987).

205. *Id.* at 867.

206. *Id.*

207. *Id.* at 865.

a duty arising out of the relationship between the parties; representations or silence which are deceptive and violative of that duty; proximate cause (reliance); and injury.²⁰⁸

Because a client has full authority over the decision to settle a case or to proceed to trial, Sanders's allegations that her attorney forced her into a settlement constituted a *prima facie* case of constructive fraud, even if the settlement was a good one.²⁰⁹ Nonetheless, the issue remained whether Sanders could supply evidence of the element that was missing from her tort claim — damages.

The court found that she could.²¹⁰ Injuries in constructive fraud, it stated, are "different than the injury in . . . [a] negligence cause of action."²¹¹ In a negligence claim, the injury is the loss of the worth of the claim; but, in constructive fraud, the primary injury is the loss of rights belonging to the weaker party.²¹²

Because the client complained of the loss of the right to choose between settlement and trial, the loss of the underlying claim was not "the exclusive measure of damages."²¹³ Thus, the attorney's evidence that the settlement amount was reasonable did "not negate the existence of a genuine issue of material fact on damages because reasonableness of the settlement amount is not determinative of the question."²¹⁴ Indeed, only nominal damages are necessary to support recovery in constructive fraud.²¹⁵

The *Sanders* decision casts doubt on the length of the statute of limitations for attorney malpractice in Indiana. That doubt is created by the court's focus on the difference in the nature of the harm in constructive fraud as opposed to negligence. Arguably, the six-year statute of limitations for fraud now applies to malpractice cases based on constructive fraud. An examination of the Indiana Supreme Court's decisions concerning the statute of limitations in attorney malpractice actions demonstrates how *Sanders* may have inadvertently changed the law.

In *Shideler v. Dwyer*²¹⁶ in 1981 and *Whitehouse v. Quinn*²¹⁷ in 1985, the supreme court clearly established that the two-year statute for injury to personal property applies to malpractice actions against attorneys. In

208. *Id.*

209. *Id.* at 866.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 867.

214. *Id.*

215. *Id.*

216. 275 Ind. 270, 417 N.E.2d 281 (1981).

217. 477 N.E.2d 270 (Ind. 1985).

Shideler, the plaintiff raised five theories: breach of contract, negligence, fraud, constructive fraud, and breach of fiduciary duty.²¹⁸ After noting that the plaintiff was attempting to avoid a statute of limitations problem by relying on pleading technicalities, the supreme court stated that the “number and variety of plaintiff’s technical pleading labels and theories of recovery cannot disguise the obvious fact — apparent even to a layman — that this is a malpractice case”²¹⁹

Accordingly, the court applied the statute of limitations for injuries to personal property, which is two years.²²⁰ Thus, according to *Shideler*, the six-year statute of limitations for constructive fraud²²¹ does not apply to malpractice cases.

That conclusion is now in doubt, however, because the rationale behind it was the same rationale used by the *Sanders* court to distinguish constructive fraud from negligence. As the supreme court later elaborated in *Whitehouse v. Quinn*, its *Shideler* decision was grounded on the principle that the applicable statute of limitations is determined “by reference to the nature of the alleged harm” rather than by the theory of recovery.²²² The court of appeals in *Sanders*, however, stated that the nature of the harm in constructive fraud is “different than the injury in . . . [a] negligence cause of action. Accordingly, the measure of damages is different.”²²³ Thus, if the nature of the harm is different, the statute of limitations for constructive fraud must be different from the statute of limitations for negligence, even though *Shideler* expressly rejected that result, because, under *Whitehouse*, the applicable limitations period is determined by the nature of the harm.

In *Whitehouse*, the supreme court refused to apply a twenty-year statute of limitations merely because a contractual relationship could be alleged. The court held that such application would create an artificial distinction among actions for damage to personal property based on whether there was a contract. *Sanders*, however, appears to create an artificial distinction between those who have actual damages and those who do not. Those who have actual damages, and sue for negligence, must do so in two years. Those who do not may allege constructive fraud and may wait six years to initiate an action. That would make little sense.

218. *Shideler*, 275 Ind. at 276, 417 N.E.2d at 285.

219. *Id.* at 277, 417 N.E.2d at 286.

220. *Id.* at 280, 417 N.E.2d at 288 (citing IND. CODE § 34-1-2-2).

221. Under IND. CODE § 34-1-2-1, the statute of limitations for fraud is six years. This statute applies to constructive fraud. *Ballard v. Drake’s Estate*, 103 Ind. App. 143, 5 N.E.2d 671 (1937).

222. *Whitehouse*, 477 N.E.2d at 272.

223. *Sanders*, 509 N.E.2d 860, 866 (Ind. Ct. App. 1987).

Nonetheless, because any breach of an attorney's fiduciary duties constitutes constructive fraud,²²⁴ plaintiff malpractice attorneys undoubtedly will contend that the statute of limitations for malpractice based on constructive fraud is now six years. The argument has at least superficial support.

It will be unfortunate if the supreme court allows *Sanders* to change the statute of limitations by implication, especially because it was not a case that directly raised the statute question. It is still possible, however, that the court of appeals will be reversed. If the supreme court does wish to extend the statute, which is doubtful, it would be more appropriate to do so in a case that directly raises a limitations issue rather than one that, like *Sanders*, changes the law by accident.

224. See 7A C.J.S. *Attorney & Client* § 251 (1981).

Notice to Creditors — Publication is No Longer Enough

KRISTIN G. FRUEHWALD*

I. INTRODUCTION

The most significant developments in the area of probate during the past year are the enactment of (1) new provisions governing notice to creditors in estate proceedings and (2) new claims periods respecting creditors' claims. The purpose of this Article is to explain the reasons for the changes and to set forth the nature of the changes and their ramifications to the practitioner. By understanding the reasons for new notice provisions and the legislative choices made, the practitioner hopefully will be less inclined to resist, or at least resent, these changes.

II. BACKGROUND

Prior to July 1, 1990, Indiana's Probate Code, as part of the probate revisions enacted in 1953, established time periods in which creditors were to file claims against an estate. Like many other jurisdictions, Indiana specified two time periods. The first time period expired five months after the first publication of notice to creditors.¹ This time period was in the nature of a nonclaims period because filing within this time period was necessary to confer jurisdiction on the court to hear the claim.² Thus, a failure to file within the time limit served as a complete bar to the adjudication of the claim.³

A second time period applied when no administration of the decedent's estate was commenced. This time period ran for one year after a decedent's death.⁴ Within this one-year period, a claimant could cause

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1. IND. CODE § 29-1-14-1(a)(1) (1988).

2. See *Lewis v. Smith's Estate*, 130 Ind. App. 390, 162 N.E.2d 457 (1959).

3. *Quinlan v. Glissman*, 142 Ind. App. 1, 232 N.E.2d 384 (1968); *Donnella v. Crady*, 135 Ind. App. 60, 185 N.E.2d 623 (1962).

4. IND. CODE § 29-1-14-1(d) (amended effective July 1, 1990).

a decedent's estate to be opened for the purpose of filing a claim against the estate.⁵

No notice of a decedent's death was required to be given in order to bar a claimant under the one-year statute. With respect to the non-claims statute (the five-month statute), notice had to be published in order to commence the running of the five-month period.⁶

Indiana law only required publication of notice to creditors.⁷ No other notice was required even if the personal representative knew the names of the decedent's creditors. Thus, the statute placed a heavy burden on creditors to be vigilant and to act promptly in filing their claims when learning of a debtor's death.⁸

5. Indiana's nonclaim and one-year statutes were by no means unique. Most states adopted limitation periods for the filing of claims. These periods ranged from two months (Oklahoma) to three years (Minnesota). See statutes cited in Note, *Tulsa Professional Collection Services v. Pope: Here Lies John Doe — But When May He Rest in Peace?*, 13 AM. J. TRIAL ADVOC. 681, 705 n.75 (1989).

6. The statute still requires claimants to file within five months "after the date of the first published notice to creditors." IND. CODE ANN. § 29-1-14-1(a)(1) (Burns Supp. 1990); IND. CODE § 29-1-14-1(a)(1) (1988) (amended effective July 1, 1990). Therefore, if no notice is published, the limitations period never starts to run.

7. IND. CODE § 29-1-7-7 (amended effective July 1, 1990).

8. A study, conducted by Professor John Langbein, concluded that "probate plays an inconsequential role in the collection of decedents' debts . . ." Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1120 (1984). For reasons explained in that article, most creditors obtain payment of their debts without resort to the claims procedures. Professor Langbein notes:

Thus, when survivors will not acknowledge or pay decedents' debts without court coercion, when survivors cannot pay, or when a decedent's estate is insolvent and apportionment of assets is necessary, creditors still elect their probate remedies if outstanding debts are large enough to justify the expense of the court proceedings. Furthermore, creditors may benefit from the probate system without actually employing it. A creditor's access to the coercive powers of the probate system has a deterrent influence that aids the creditor in his attempts to obtain out-of-court satisfaction from survivors (and from probate representatives — executors and administrators).

The creditor protection procedures of American probate law developed in the nineteenth century to serve needs radically different from today's. By routinizing the process of calculating and evidencing consumer debts, the data processing revolution has virtually eliminated the problem toward which much of the debt-resolving phase of probate procedure has been oriented

In the late twentieth century, creditor protection and probate have largely parted company. Had this development been otherwise, the rise of the will substitutes could not have occurred. If creditors had continued to rely significantly upon probate for the payment of decedent's debts, creditors' interests would have constituted an impossible obstacle to the non-probate revolution. For — make no mistake about it — the will substitutes do impair the mechanism by which probate protects creditors. Even though the substantive law governing

Although publication may have created a hardship on creditors by placing a duty of vigilance on their shoulders, it provided efficiency in the estate administration process. Personal representatives did not have to expend time and money serving notice upon all creditors. Further, personal representatives were assured that, after the five-month claims period expired, estate assets safely could be distributed free from the claims of creditors.

III. TULSA PROFESSIONAL COLLECTION SERVICES, INC. v. POPE

The rules of the game changed, however, when the United States Supreme Court entered its decision in *Tulsa Professional Collections Services, Inc. v. Pope*.⁹ The Supreme Court applied the language in *Mullane v. Central Hanover Bank & Trust Co.*¹⁰ to the estate context. *Mullane* stated that “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested

most of the major will substitutes usually recognizes the priority of creditors' claims over the claims of gratuitous transferees (life insurance is sometimes an exception), [footnote deleted] the decentralized procedures of the nonprobate system materially disadvantage creditors. Whereas probate directs all assets and all claimants to a common pot, the nonprobate system disburses assets widely and facilitates transfer without creditors' knowledge. [footnote deleted] If modern creditors had needed to use probate very much, they would have applied their considerable political muscle to suppress the nonprobate system. Instead, they have acquiesced without struggle, as have the most powerful of creditor-like agencies, the federal and state revenue authorities.

Id. at 1124-25.

9. 485 U.S. 478 (1988). In *Pope*, the decedent's personal representative opened the estate and, pursuant to Oklahoma law, gave notice to creditors by publication. A claim was asserted against the estate by Tulsa Professional Collection Services after the two-month Oklahoma time limitation on the filing of claims ran. The local probate court, the Oklahoma Court of Appeals, and the Oklahoma Supreme Court held that the claim was barred. *Id.* at 482, 483. This case has been widely discussed in numerous other articles. It is not the author's intent to conduct an analysis of *Pope*. For that purpose, the author refers readers to some excellent articles that discuss the case in some depth. See Note, *supra* note 5, at 697; Note, *Constitutional Law — Due Process — When Executor Either Knows or May Reasonably Ascertain the Identity of an Estate's Creditor He Must Provide Actual Notice That Creditor's Claim Will Terminate*, 58 Miss. L.J. 193 (1988); Note, *New Requirements of Creditor Notice in Probate Proceedings*, 54 Mo. L. REV. 189 (1989); Note, *Probate Nonclaim Statutes and the Tulsa Decision: Requiring Actual Notice To Reasonably Ascertainable Creditors*, 18 STETSON L. REV. 471 (1989); Note, *Probate — Satisfying the Due Process Requirement of Actual Notice To Estate Creditors*, 11 U. ARK. LITTLE ROCK L.J. 603 (1988); Note, *Due Process Requires Actual Notice To Known or Reasonably Ascertainable Estate Creditors: Tulsa Professional Collection Services v. Pope*, 58 U. CIN. L. REV. 303 (1989).

10. 399 U.S. 306 (1950).

parties of the pendency of the action and afford them an opportunity to present their objections.”¹¹ *Mullane* and its progeny established the guideline that, whenever a legal proceeding may affect a property right, due process requires reasonable notice and a realistic opportunity to respond.¹²

The Supreme Court in *Pope* examined Oklahoma’s nonclaim statute which, in effect, was similar to Indiana’s nonclaim statute (although it provided for only a two-month claims period) and held that: (1) state action was present in the probate proceedings governing the estate,¹³ and (2) failure to give personal notice to known or reasonably ascertainable creditors violated the fourteenth amendment based on the rationale in *Mullane*.¹⁴

The Court was not insensitive to the need to bring a decedent’s affairs to a close. The Court noted that a state has an interest in promoting the efficient administration and timely closing of a decedent’s estate, but also noted that, on the whole, the failure to give actual notice to known or reasonably ascertainable creditors must be corrected.¹⁵ It concluded that actual notice is not truly inconsistent with the state’s legitimate interest in the prompt conclusion of estates.¹⁶

Thus, *Pope* invalidates as unconstitutional statutes that require only published notice to those creditors who are “known or reasonably as-

11. *Id.* at 314.

12. See Reutlinger, *State Action, Due Process, and the New Nonclaim Statutes: Can No Notice Be Good Notice if Some Notice Is Not?*, 24 REAL PROP. PROB. & TR. J. 433, 435 n.9 (1990).

13. In support of its “state action” finding, the Court in *Pope* noted:

Here . . . there is significant state action. The probate court is intimately involved throughout, and without that involvement the time bar is never activated. The nonclaim statute becomes operative only after probate proceedings have been commenced in state court [The state court’s] involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment.

Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 487 (1988). Chief Justice Rehnquist expressed his opinion that the state’s involvement was “virtually meaningless” and the probate court’s actions were “perfunctory.” *Id.* at 494 (Rehnquist, C.J., dissenting).

14. In addition to these two findings, the Court also found that an unsecured claimant has “an interest in property protected by the Fourteenth Amendment.” *Id.* at 485.

15. *Id.* at 489.

16. *Id.* at 489, 490. Prior to the *Pope* decision, several courts addressed the issue of due process vis-a-vis published notice to creditors in estate proceedings. Many held that due process considerations were outweighed by the costs, delays, and inefficiencies involved in giving actual notice. See *Union Pac. R.R. v. Estate of Madden*, 241 Kan. 414, 736 P.2d 940 (1987); *Estate of Busch v. Ferrell Duncan Clinic*, 700 S.W.2d 86 (Mo. 1985); *Gibbs v. Estate of Dolan*, 146 Ill. App. 3d 203, 496 N.E.2d 1126 (1986).

certainable.”¹⁷ Because Indiana’s statute prior to July 1, 1990 required only published notice to all creditors,¹⁸ known or unknown, this statute failed to meet the fourteenth amendment’s due process requirements as mandated in *Pope*. Because Indiana’s statute could not survive a constitutional challenge under *Pope*, the nonclaims portion of Indiana’s statute would not bar the claims of known or reasonably ascertainable creditors who did not receive personal notice of the opening of the estate and of the running of the five-month-claims period.

The Court in *Pope* further drew a distinction between nonclaims statutes — those that run upon publication of notice — and “self-executing statute[s] of limitation”¹⁹ — those that run from the date of an event not involving state action (such as a date of death). The Court noted that, although a limitation period may be specified in a state statute, the limitation period alone does not necessarily involve a sufficient level of state action to invoke the fourteenth amendment.²⁰

Indiana’s Legislature addressed the constitutional issues raised by *Pope* in its 1990 legislative session. The result reflects an attempt to balance continued efficiency in the estate administration process and the timely closing of decedent’s estates with the *Pope* due process requirements. The end result of the legislature’s activity was a group of statutory changes that initially appear to be more complex than necessary in response to *Pope*. A second glance, however, reveals that these changes will cause only minor adjustments in the day-to-day practice of estate administration.²¹

17. *Pope*, 485 U.S. 478, 491.

18. IND. CODE § 29-1-7-7 (1988) (amended July 1, 1990). Professor Falender concurs that Indiana’s statute failed to pass constitutional muster after *Pope*. 1 HENRY’S INDIANA PROBATE LAW & PRACTICE § 307 (D. Falender 8th ed. 1989). She also asserts that this constitutional inadequacy further extends to Indiana’s failure to give actual notice to heirs at law in testate estates. *Id.*

19. *Pope*, 485 U.S. at 486-87.

20. *Id.*

21. A legislative goal in response to *Pope* “should be to effect compliance with *Pope*’s ‘actual notice’ requirement while minimizing the negative impact of such compliance on prompt, efficient and economical estate settlement.” Waterbury, *Notice To Decedents’ Creditors*, 73 MINN. L. REV. 763, 774-75 (1989). Professor Waterbury expressed his belief that these new statutes should resolve the constitutional problem in favor of successors rather than creditors. Professor Waterbury noted that “[t]he conclusion that legislatures should revise short-term statutes for the primary benefit of successors rather than creditors is significant because it excludes from consideration some remedial legislation for which substantial precedent exists.” *Id.* at 775-76. This remedial legislation includes procedures that would allow direct succession without estate administration and would put the burden of satisfying claims on a decedent’s successors. This result could be achieved simply by removing any time bar to the filing of claims. *Id.* at 777.

IV. LEGISLATIVE CHOICES

The new notice requirements and changes to Indiana's claims statutes are found in Public Law 154-1990.²² This bill was joined in committee with the IOLTA (Interest On Lawyer's Trust Accounts) measure, which was hotly debated in the Indiana House and Senate and was recently struck down by the Indiana Supreme Court.²³ The court's finding that the IOLTA provisions were invalid will not affect the validity of the new notice provisions.²⁴

Specifically, the new provisions address four outstanding problems faced in the wake of *Pope*. The first problem concerns who should receive actual notice; the second concerns what type of notice should be given to creditors; the third concerns when notice to creditors should be given; and the fourth concerns what time limitation should be placed on the claims of those creditors who are arguably reasonably ascertainable but who are notified only by publication. The legislature's response to these questions is addressed in the subsequent portions of this Article.

A. *Who Should Receive Actual Notice*

Pope appears to require actual notice to "known or reasonably ascertainable" creditors.²⁵ Indiana's new statute adopted this language,²⁶ with the caveat that actual notice needs to be sent only to creditors whose claims remain unpaid.²⁷ Therefore, publication notice to known or reasonably ascertainable claimants is no longer sufficient.

B. *The Type of Notice*

Prior to July 1, 1990, Indiana law prescribed the form of notice to be published.²⁸ The statute mandated the form of notice and required the notification to be sent to distributees.²⁹ The new statute similarly

22. 1990 Ind. Acts 1044.

23. *In re Public Law 154-1990*, 561 N.E.2d 791 (Ind. 1990).

24. *Id.* at 794.

25. *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 491 (1988).

26. IND. CODE ANN. § 29-1-7-7(d)(2) (Burns Supp. 1990). This statutory change puts Indiana among those states that require *actual* notice to creditors. For examples of other states that require actual notice, see FLA. STAT. § 733.212(4)(a) (Supp. 1990); UTAH CODE ANN. § 75-3-801 (Supp. 1990). Several states have opted not to require actual (and sometimes even published) notice at all. This appears to be one approach favored by drafters of the Uniform Probate Code. UNIF. PROB. CODE § 3-801 to -803 (1969). The Uniform Probate Code contains language that would allow adopting states to make publication of actual notice optional. *Id.*

27. IND. CODE ANN. § 29-1-7-7(d)(3) (Burns Supp. 1990).

28. IND. CODE § 29-1-7-7 (1988) (amended July 1, 1990).

29. *Id.*

prescribes a statutory form of notice to be sent to distributees and creditors and to be published.³⁰ Thus, Indiana now requires two types of notice: (1) actual notice to known and reasonably ascertainable creditors, and (2) published notice to all other creditors.

The form of notice is similar to the notice form previously required in Indiana.³¹ Like prior Indiana law, a copy of the notice must be published in a newspaper of general circulation in the county in which the court administering the decedent's estate is located.³² Unlike prior Indiana law, the new notice provisions provide that notice can be published in the county adjacent to the county where the estate is being administered if the county where the estate is being administered has no newspaper of general circulation.³³ This language was not added in response to *Pope*, but rather in response to complaints from attorneys practicing in counties where the newspapers of general circulation were published in adjoining counties.

The clerk is required to mail the statutory notice to each distributee *and creditor* whose name and address is in the petition for probate or issuance of letters.³⁴ Thus, notice to creditors can be given at the

30. IND. CODE ANN. § 29-1-7-7(i) (Burns Supp. 1990).

31. *Id.* The new notice form states:

NOTICE OF ADMINISTRATION

In the _____ Court of _____ County, Indiana.

Notice is hereby given that _____ was, on the _____ day of _____, 19____, appointed personal representative of the estate of _____, deceased, *who died on the _____ day of _____, 19_____.*

All persons *who have* claims against *this* estate, whether or not now due, must file the *claim in the office of the clerk of this court* within five (5) months from the date of the first publication of this notice, *or within one (1) year after the decedent's death, whichever is earlier*, or the claims will be forever barred.

Dated at _____, Indiana, this _____ day of _____, 19_____.

CLERK OF THE _____ COURT

FOR _____ COUNTY, INDIANA

Id. (italics indicate changes from prior law). The date of death must be disclosed in the notice because of one of the new statutes of limitations respecting claims, discussed *infra* at Section VII.

32. IND. CODE ANN. § 29-1-7-7(b).

33. *Id.*

34. *Id.* § 29-1-7-7(c). The amended statute reads:

(c) *The notice required under subsection (a) shall be served by mail on each*

commencement of the estate's administration. As discussed later, this is not the only time that notice can be given.

C. When Notice is to be Given

The question of when notice must be given to creditors is problematic. The legislature realized that notice could not be required to be given at the time of the opening of the estate because it would cause inordinate and often detrimental delays in the opening of the estate.

Requiring notice at the time of the opening of an estate produces three apparent drawbacks. First, requiring notice at the time of the opening of an estate imposes an almost insurmountable burden on a proposed personal representative to ascertain the identity of a decedent's creditors before the personal representative's appointment. Learning the creditors' identities would be difficult and sometimes impossible because appointment is often a prerequisite to obtaining and reviewing a decedent's records. Second, requiring notice at the time of opening an estate requires giving notice to *all* creditors, including those that the personal representative intends to pay, and would be unduly burdensome and expensive. Finally, requiring notice at this time does not give the personal representative any protection if a creditor were discovered after the opening.

The statute may require the personal representative to give notice upon discovering a creditor. This notice requirement would be easy to administer, except that each notice would result in the commencement of a different nonclaims period operative to each particular creditor. Thus, an estate would never be able to put itself outside the claims period because additional claimants could be discovered at any time during the estate's administration.

The third time when notice could be given would be within a reasonable period after the estate is opened. This would allow the personal representative some time to ascertain the identity of a decedent's creditors and to pay those creditors whose debts the personal representative determined to be valid obligations of the decedent. However, this would not necessarily resolve the problem of finally cutting off claims of creditors who are not notified.

The legislature adopted the last approach with some modifications designed to incorporate a final limitation on the filing of claims by

heir, devisee, legatee, *and known creditor* whose name and address is set forth in the petition for probate or letters. The personal representative shall furnish sufficient copies of *the* notice, prepared for mailing, and the clerk *of the court* shall mail the *notice upon the issuance of letters*.

Id. (italics indicate changes from prior law).

unnotified-but-known or reasonably ascertainable creditors. Indiana law now requires notice to be sent to known or reasonably ascertainable creditors within three months after the first published notice to creditors.³⁵ If this notice is sent after the estate is opened, the personal representative is required to send the notice.³⁶ After the estate is opened, the personal representative should have an adequate idea of the decedent's creditors and should also have an opportunity to examine the validity of the decedent's debts and to pay those believed to be valid. Thus, notice will never need to be delivered to the great bulk of creditors — those creditors whose debts are paid by the personal representative.

The statute provides that the personal representative or the personal representative's agent can give notice.³⁷ This language would allow the notice to be given by the estate's attorney, for example. Service by the attorney should be convenient for a personal representative because the attorney can keep a list of those notified along with any evidence of service in the attorney's files. The list of notified creditors is also useful to the attorney in preparing a schedule of notified creditors. This schedule is to be given to the clerk as soon as possible after notice has been given.³⁸

Questions exist pertaining to whether a creditor's *actual* knowledge that the decedent had died would be sufficient notice under *Pope*.³⁹ Knowledge of a debtor's death should not, however, constitute sufficient notice because it does not give the creditor knowledge that a time limitation is running against the creditor, any knowledge of the pendency of the action, or the opportunity to present the creditor's claim. Support for this proposition is found in *Pope*. The claim in *Pope* arose from services rendered by the hospital in which the decedent died. The claimant was a subsidiary of the hospital and had actual notice of the decedent's

35. *Id.* § 29-1-7-7(e).

36. *Id.* § 29-1-7-7(d). This statute states:

(d) The personal representative or the personal representative's agent shall serve notice on each creditor of the decedent:

(1) whose name is not set forth in the petition for probate or letters under subsection (c);

(2) who is known or reasonably ascertainable within three (3) months after the first publication of notice under subsection (1); and

(3) whose claim has not been paid or settled by the personal representative.

The notice may be served by mail or any other means reasonably calculated to ensure actual receipt of the notice by a creditor.

Id.

37. *Id.*

38. *Id.* § 29-1-7-7(f).

39. *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478 (1988).

death. This actual notice of the death was not sufficient to overcome the lack of notice of the proceedings.⁴⁰

D. Nonclaims Statute

In requiring actual notice to known and reasonably ascertainable creditors, Indiana did not shorten its applicable claims period. For creditors notified by publication and for those notified within the first three months of the commencement of the estate's administration, the claims period remains at five months from the date of the first published notice to creditors.⁴¹ However, if the personal representative fails to give this notice, or discovers a creditor after the three-month period expires, creditors will have (1) five months from the date of the first published notice to creditors, and (2) an additional two-month period that runs from the date notice is given to file their claims.⁴² A final limitation for filing claims is discussed in a later portion of this Article.⁴³

The practical effect of this statutory change is that the creditor will have only two months after actual notice in which to file the claim if the creditor is notified three months after the date of the first published notice to creditors. The two-month period is a shorter period of time than that allowed to claimants notified by publication.⁴⁴ This shortened period should not be an impediment to these creditors, however. Unknown creditors, if they miss the published notice, must still discover that the decedent died and must locate the decedent's estate (a process that may take several months). The notified creditor, however, knows

40. *Id.* at 491.

41. IND. CODE § 29-1-14-1(a)(1) (1988). Some states have shortened their statutory claims period when actual notice is given. This shortened claims period makes some sense because claims generally are easily ascertainable and simple to file. *See* MINN. STAT. § 524.3-801 to -803 (1989); MO. REV. STAT. § 473.444 (1989).

42. IND. CODE ANN. § 29-1-7-7(e) (Burns Supp. 1990). This statute states: (e) Notice under subsection (d) shall be served within three (3) months after the first publication of notice under subsection (a) or as soon as possible after the elapse of three (3) months. If the personal representative or the personal representative's agent fails to give notice to a known or reasonably ascertainable creditor of the decedent under subsection (d) within three (3) months after the first publication of notice under subsection (a), the period during which the creditor may submit a claim against the estate includes the period specified under IND. CODE § 29-1-14-1 and an additional period ending two (2) months after the date notice is given to the creditor under subsection (d). However, a claim subject to this subsection may not be filed more than one (1) year after the death of the decedent.

Id.

43. *See infra* Section VII.

44. Several commentators have noted that a shortened time period is, perhaps, unfair. *See generally* Reutlinger, *supra* note 12.

that the decedent died, knows where the estate is located, and knows the time limitation for presentation of the claim. Filing a claim against an estate, unlike filing many other lawsuits, is a simple matter which only requires filing with the court a short, succinct statement of the claim, together with any underlying documents. Many courts even provide claim forms. Considering that defendants have only twenty days to respond to a lawsuit filed against them before default,⁴⁵ the sixty-day-claim period seems more than adequate.

The notice served on a creditor must be served either by mail or by "any other means reasonably calculated to ensure actual receipt of the notice by a creditor."⁴⁶ This language comes from *Mennonite Board of Missions v. Adams*.⁴⁷ The language was later adopted by the Court in *Pope*.⁴⁸ This statutory language that provides for service by other means should preserve flexibility in the delivery of notice in the event that means more appropriate than first-class mail are available. However, in opting to use other means of service, the personal representative or the agent of the personal representative should keep in mind that proof of service may become important. The personal representative should select the form of service resulting in actual notice which furnishes some proof not only that notice was served, but when it was served.

To comply with due process, notice to a decedent's creditors should contain statements not only that the decedent died but also that a time limitation will affect any claims that are not presented prior to the running of the limitation period. The prescribed statutory notice form contains language meeting these requirements.⁴⁹ However, this notice form should not be used in all circumstances. For notice given more than three months after the first published notice to creditors (and, thus, who have a time limitation expiring two months after the notice), the statutorily prescribed notice should be tailored to reflect the actual expiration of the nonclaims period applicable to the particular claimant.

V. DUE DILIGENCE

As noted previously, *Pope* requires notice to both known and reasonably ascertainable creditors.⁵⁰ Because known creditors are presumably those who are actually known to the personal representative, the words "reasonably ascertainable" must refer to those who are not known but

45. See, e.g., FED. R. CIV. P. 12(b).

46. IND. CODE ANN. § 29-1-7-7(d) (Burns Supp. 1990).

47. 462 U.S. 791, 800 (1983).

48. *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 491 (1988).

49. IND. CODE ANN. § 29-1-7-7(i) (Burns Supp. 1990).

50. See *supra* note 14 and accompanying text.

who could become known upon investigation by the personal representative. One question that will certainly arise with respect to this class of claimants is whether the personal representative used sufficient effort (that is, used due diligence⁵¹) to locate these creditors. Most claimants who were not notified and whose claims are barred likely will argue that they were known or reasonably ascertainable and that the statutory bar should not operate against their claims.

In an attempt to address these anticipated arguments, the Indiana Legislature provided the personal representative with some guidance as to the meaning of "due diligence" in the estate context. The statute now provides that due diligence in ascertaining creditors will be found if the personal representative reviews any financial records of the decedent's that are "reasonably available" to the personal representative and if the personal representative makes reasonable inquiry of persons "likely to have knowledge of the decedent's debts."⁵²

To avoid placing an insurmountable burden on personal representatives, the personal representative is bound to "reasonableness" standards that appear throughout the statute.⁵³ Documents to be reviewed are only those "reasonably available."⁵⁴ Inquiries to individuals are limited to those "likely to have knowledge of the decedent's debts"⁵⁵ and then to only "reasonable inquiries."⁵⁶ These limitations are designed to avoid the personal representative's self-imposed duty (or arguments that the personal representative has a duty) to reconstruct the decedent's financial records and to interview anyone remotely connected to the decedent's affairs.⁵⁷

51. The Court in *Pope* appeared to endorse a standard of "reasonable diligence." 485 U.S. at 491.

52. IND. CODE ANN. § 29-1-7-7.5(a), (b) (Burns Supp. 1990). This statute provides: (a) A personal representative shall exercise reasonable diligence to discover the reasonably ascertainable creditors of the decedent within three (3) months of the first publication of notice under section 7 of this chapter.

(b) A personal representative is considered to have exercised reasonable diligence under subsection (a) if the personal representative:

(1) conducts a review of the decedent's financial records that are reasonably available to the personal representative; and

(2) makes reasonable inquiries of the persons who are likely to have knowledge of the decedent's debts and are known to the personal representative.

Id.

53. *Id.* § 29-1-7-7.5(b)(2).

54. *Id.* § 29-1-7-7.5(b)(1).

55. *Id.* § 29-1-7-7.5(b)(2).

56. *Id.*

57. Professor Waterbury indicated that statutes which only require a "reasonably diligent" search will cause the personal representative to conduct a "rather extensive search, impairing the prompt and economical administration of estates while infrequently revealing

The due diligence requirement should not impose a new and substantial burden on personal representatives. These due diligence searches generally are conducted in estate proceedings to fully ascertain all of a decedent's assets. Under either Indiana's due diligence requirements or commentators' definitions,⁵⁸ no requirement exists to obtain bank statements, cancelled checks, or other documents not otherwise available to the personal representative. Anyone who has tried to obtain these documents knows that the effort results in substantial expense and delay.

Although the statute does not require the personal representative to track down and recreate documents not available, some questions may arise as to what documents are "reasonably available."⁵⁹ Documents at the decedent's home and business undoubtedly will be reasonably available. The need to obtain documents located elsewhere should be evaluated based on the reasonableness standard. The question whether to obtain a document may involve balancing the time, effort, and funds needed to obtain it with the document's probable productivity in ascertaining creditors. The personal representative has a clear obligation to review documents available to the personal representative and, presumably, to investigate further those items that might result in revealing any unpaid debts of the decedent.

A "reasonable"⁶⁰ search may be harder to define when applied to the duty to inquire of individuals. Presumably, the personal representative must interview the decedent's spouse, children, and other heirs likely to have knowledge of the decedent's debts. A decedent's guardian, attorney-in-fact under a power of attorney, accountants, or business partners would also be reasonable sources. Beyond these, however, the duty to examine other acquaintances becomes less clear. Must the personal representative make inquiries of neighbors or friends? What if the personal representative is aware that they may have rendered services to the decedent prior to death?

unknown creditors." Waterbury, *supra* note 21, at 782. Hopefully, Indiana's statutes provide sufficient guidance to prevent these costly, time consuming, and extensive searches.

58. Professor Falender, in a persuasive article cited by the U.S. Supreme Court in *Pope*, asserts that "reasonable diligence" would include:

[A] timely search of the decedent's home, office and safe deposit box; an investigation of the books and records uncovered by the search, including the decedent's tax returns; and an inquiry of those of the decedent's relatives, acquaintances, business associates, and professional advisors whom the representative believes to be fertile sources of information. The concept of reasonable diligence would charge the personal representative with the actual knowledge of the decedent's heirs, devisees and acquaintances.

Falender, *Notice To Creditors in Estate Proceedings: What Process Is Due?*, 63 N.C.L. REV. 659, 696 (1985).

59. IND. CODE ANN. § 29-1-7-7.5(b)(1).

60. *Id.* § 29-1-7-7.5(a), (b).

The personal representative would be well advised to keep good records of the "diligent" search.⁶¹ For example, these records may include a record of the documents examined and the persons consulted. If a creditor later asserts that it was reasonably ascertainable, but that it was not ascertained because of the personal representative's failure to exercise due diligence, these records will be helpful to the personal representative. A diligent search, as outlined in the statute, raises the presumption that the creditor was "not reasonably ascertainable."⁶² This presumption can only be rebutted by "clear and convincing evidence."⁶³

As proof that the statutory guidelines have been fulfilled, the personal representative of either a supervised or unsupervised estate "may file an affidavit with the clerk . . . stating that the personal representative has complied" with the statute's due diligence requirements.⁶⁴ In a supervised estate, the personal representative can also file a petition requesting an order from the court that creditors remaining unknown after this diligent search are "not reasonably ascertainable."⁶⁵ This type of order should not be available to personal representatives of unsupervised estates because the court arguably retains no authority to enter orders in these estates.⁶⁶

VI. NOTICE

A. *Who Must Furnish Notice*

Under Indiana's new notice law, the clerk of the court is required to give notice to all creditors whose names are disclosed in the petition

61. *Id.*

62. *Id.* § 29-1-7-7.5(d). This statute states:

If a personal representative complies with the requirements of subsection (b), the personal representative is presumed to have exercised reasonable diligence to ascertain creditors of the decedent and creditors not discovered are presumed not reasonably ascertainable. The presumptions may be rebutted only by clear and convincing evidence.

63. *Id.*

64. *Id.* § 29-1-7-7.5(c). This statute states:

A personal representative may file an affidavit with the clerk of the court stating that the personal representative has complied with the requirements of subsection (b). In addition, a personal representative may petition the court for an order declaring that:

(1) the personal representative has complied with the requirement of subsection (b); and

(2) any creditors not known to the personal representative after complying with the requirements of subsection (b) are not reasonably ascertainable.

65. *Id.* § 29-1-7-7.5(c)(2).

66. *Id.* § 29-1-7-7.5(b), (c).

to open the estate.⁶⁷ The personal representative is required to give notice to any known or reasonably ascertainable creditors whose names are not in the petition.⁶⁸

Unlike some proposals,⁶⁹ Indiana's statute provides that the personal representative "shall"⁷⁰ give notice to known or reasonably ascertainable creditors discovered after the opening of the estate. Because the statutory language does not contain the permissive "may,"⁷¹ personal representatives should take this new obligation to give notice seriously.

B. Effect of Giving Notice

Although notice is required to be given to "known or reasonably ascertainable"⁷² creditors, there may be a category of claimants who may or may not be creditors. This category is comprised of creditors believed by the personal representative to have doubtful claims. Examples are a claim for services or claims that might be barred by a statute of limitations. The personal representative will want to notify these claimants in order to start the claims period running against their claims. A question arose during the legislative drafting process as to whether notification would raise the presumption that the personal representative believed the claim was valid. To protect personal representatives from any hint that the delivery of notice constitutes the personal representative's belief that the notified creditor has a valid claim against the estate, the legislature provided that "[t]he giving of notice to a creditor or the listing of a creditor on the schedule delivered to the clerk of the court does not constitute an admission by the personal representative that the creditor has an allowable claim against the estate."⁷³

The new statutory language should safely permit the personal representative to notify even those creditors having doubtful claims in order to start the running of the nonclaims period against those creditors.

C. Notice to Incapacitated Persons

A potential claimant may not be competent at the time notice is to be served on the claimant. In this event, the statute provides that notice

67. *Id.* § 29-1-7-7(c). The personal representative is required to furnish the clerk with sufficient copies of the notice "prepared for mailing." *Id.* Presumably, this means that the notices must be accompanied by envelopes addressed to the potential claimants.

68. *Id.* § 29-1-7-7(d).

69. *See, e.g.,* UNIF. PROB. CODE § 3-801 to -803 (1969).

70. IND. CODE ANN. § 29-1-7-7(c).

71. *See id.*

72. *Id.* § 29-1-7-7(d)(2).

73. *Id.* § 29-1-7-7(g).

to an incapacitated person can be delivered to that person's natural or legal guardian or to a person who has the care and custody of the incompetent person.⁷⁴ This provision pertains to distributees of an estate as well as to creditors.

VII. LONG-TERM STATUTE OF LIMITATIONS

The United States Supreme Court in *Pope* devoted some time to discussing the difference between statutes that commence due to some court involvement, such as a court's direction to publish notice, and statutes that commence because of an act not involving court action, such as the death of an individual.⁷⁵ The court termed these latter statutes "self-executing statutes of limitations."⁷⁶ The former statutes, because they involve state action, are subject to the ambit of the fourteenth amendment. The latter statutes, which involve no role for the state to play "beyond enactment of the limitation period,"⁷⁷ do not involve sufficient state action to bring them within the reach of the fourteenth amendment. The Court's discussion of the possible lack of state action in self-executing statutes of limitations offered Indiana's Legislature some hope that 1) estates could be brought outside the creditors' claims period, and 2) final cutoff points for the filing of claims could be established.⁷⁸

Indiana's long-term statute of limitations is similar to the statute referred to in *Pope* as a "self-executing statute of limitations."⁷⁹ Prior

74. *Id.* § 29-1-7-7(h).

75. *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 486 (1988).

76. *Id.* at 486-87.

77. *Id.*

78. The Court in *Pope* did not state clearly that statutes which run from the date of death do not involve state action. Oklahoma did not have such a long-term statute and, thus, no decision was made with respect to the classification of this type of statute. *Id.* at 488. Commentators disagree as to whether a self-executing statute of limitations (i.e., a statute that runs from the date of death) falls within the *Pope* due process requirements. Compare *Waterbury*, *supra* note 21, at 783 (self-executing statutes of limitations do not violate due process) with *Reutlinger*, *supra* note 12, at 435 (a self-executing statute of limitations that eliminates notice to creditors violates due process).

79. *Pope*, 485 U.S. at 486. The Court's example of a self-executing statute of limitations was the statute involved in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). *Texaco* involved Indiana's Mineral Lapse Act, which provided that an unused, severed mineral interest would lapse if not "used" for a 20-year period. Lapse could be avoided by filing a statement of claim with the county recorder. Indiana's long-term statute provided: "All claims barrable under the provisions of subsection (a) hereof shall, in any event, be barred if administration of the estate is not commenced within one (1) year after the death of the decedent." IND. CODE § 29-1-14-1(d) (1988) (amended July 1, 1990). Similar to the statute cited in *Texaco*, the time limitation runs from a date that is determined independently of any involvement by the state. Also similar to the statute cited in *Texaco*, recourse to protect against the running of the statute is provided because the claimant can open the estate and file the claim before the period runs.

to the enactment of the new provisions, Indiana's "self-executing statute"⁸⁰ set forth a one-year period for filing claims. However, Indiana's statute only applied whenever an estate for the decedent was not being administered. To achieve its goal of prescribing a final period within which claims must be filed in all estates, both administered and not administered, the legislature amended the self-executing statute of limitations and made it applicable even when estate administration is commenced. The amended statute now bars all claims not filed within one year from a decedent's death.⁸¹

The limitations period of one year was retained.⁸² Although Indiana law requires all estates to file final accounts within one year after the appointment of a personal representative unless good cause is shown for the estate to remain open,⁸³ a personal representative may now find it advisable to postpone closing the estate until after the one-year period expires.⁸⁴ This delay is unfortunate but, given the personal representative's duty to pay creditors, may be unavoidable.

The one-year bar on claims may be a statute of limitations and not a nonclaims statute. Because the barring of untimely claims under a nonclaims statute is not subject to attack on any basis,⁸⁵ the running of a nonclaims statute clearly provides an estate with the most assurance that the claims of a creditor who did not file within the period are barred. A statute of limitations, however, is subject to certain defenses.

80. IND. CODE § 29-1-14-1(d) (1988) (amended July 1, 1990).

81. IND. CODE ANN. § 29-1-14-1(d) (Burns Supp. 1990). This statute provides as follows: "All claims barrable under subsection (a) shall be barred if not *filed* within one (1) year after the death of the decedent."

82. Whether a one-year statute of limitations is lengthy enough to survive constitutional challenge is still a matter of debate. Waterbury, *supra* note 21, at 786, believes that it is, while Reutlinger, *supra* note 12, at 464, believes that a minimum period for the running of this type of statute should be 18 months. Both apparently agree on the need to put a final time bar on the filing of claims.

83. IND. CODE ANN. § 29-1-16-2 (Burns Supp. 1990). A review of Indiana estates would undoubtedly disclose that a substantial number of them are not closed within the one-year period.

84. Professor Waterbury noted that a delay in closing estates to allow a long-term statute of limitations to run may be the effect of these statutes. Waterbury, *supra* note 21, at 784. He stated:

The personal representative's simplest solution may be to postpone distribution and closing of the estate until the long-term statute runs, if this would not delay distribution for an unacceptable period. Otherwise, the representative may conduct an excessive search for creditors at estate expense, to guard against the assertion of claims after distribution and closing of the estate. If the personal representatives [sic] follows either course, prompt and efficient estate administration will be compromised.

Id.

85. See *supra* notes 2-3.

If the one-year statute is a statute of limitation, the running of the one-year period may not act as a complete bar to any claims that are filed after one year if a defense to the running of the statute is claimed. Because of the possibility that these claims might not be barred, the legislature chose to keep the nonclaims period and to reinforce it with the one-year statute, although the easier course would have been to replace the nonclaims period with the statute of limitations.

In addition, whenever an estate is opened, the effect of the long-term statute of limitations will operate only to bar the claims of unnotified creditors who become known either after the expiration of the one-year period or within one month before the one-year period expires. All other creditors' claims will have been barred by the nonclaims statute, either because the claimants were unknown, thus barring their claims by the published notice, or because the claimant failed to file a timely claim after receiving actual notice.

VIII. TECHNICAL CHANGES — UNSUPERVISED ESTATES

When the notice statutes were revised, certain technical changes were required to make other provisions of the code consistent with the new notice requirements. One change affects procedures in unsupervised estates, changing the notice requirements for unsupervised estates⁸⁶ and the averments included in an unsupervised estate's closing statement.⁸⁷

86. IND. CODE ANN. § 29-1-7.5-1 (Burns Supp. 1990). This statute was amended to provide:

(a) Upon the filing of a petition under I.C. 29-1-7-5, the following persons may at any time petition the court for authority to have a decedent's estate administered without court supervision:

- (1) The decedent's heirs at law if the decedent dies intestate.
- (2) The legatees and devisees under the decedent's will.
- (3) The personal representative.

(b) The clerk of the court shall give notice of *the filing of a* petition for unsupervised administration to creditors of the decedent as provided in I.C. 29-1-7-7(c) and I.C. 29-1-7-7(d).

Id. (Emphasis indicates new provisions).

87. *Id.* § 29-1-7.5-4. This statute was amended to read:

(a) Unless prohibited by order of the court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court no earlier than five (5) months after the date of original appointment of a general personal representative for the estate, a verified statement stating that *the personal representative*, or a prior personal representative, has *done the following*:

(1) Published notice to creditors as provided in I.C. 29-1-7-7(b), and that the first publication occurred more than five (5) months prior to the date of the statement.

(2) *Provided notice to creditors as required under I.C. 29-1-7-7(c) and I.C.*

Pursuant to these changes, the personal representative must report to the court that notice has been sent to those creditors of the decedent's not otherwise notified by the clerk. The personal representative must include that assertion in the closing statement.

IX. SUMMARY

Indiana's new notice provisions reflect a balancing of constitutional due process requirements with the state's interest in expeditiously closing estates. Certainly these provisions increase the personal representative's duties. No longer may the representative sit back and let creditors come to him or her. The personal representative must now take affirmative action to locate and identify creditors and to serve them with notice in a timely fashion. Indiana's statute does not require the performance of these duties at all costs, however. The statute provides guidelines that should help limit the personal representative's search to reasonable bounds. Final time limitations will assist in closing estates with some certainty and will protect estates, personal representatives, and heirs against stale claims. Although estate practitioners are undoubtedly disturbed at the new constitutional notice requirements, Indiana's new rules should meet the constitutional challenge with a minimum of expense, inconvenience, and delay.

29-1-7-7(d).

(3) Fully administered the estate of the decedent by making payment, settlement, or other disposition of all claims which were presented, expenses of administration and estate, inheritance, and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If any claims remain undischarged, the statement shall:

(A) state whether the personal representative has distributed the estate, subject to possible liability, with the agreement of the distributees; or

(B) detail other arrangements which have been made to accommodate outstanding liabilities.

(4) Sent a copy of *the statement* to all distributees of the estate and to all creditors or other claimants of whom *the personal representative* has actual knowledge whose claims are neither paid nor barred and has furnished a full account in writing of *the personal representative's* administration to the distributees whose interests are affected.

(b) If no proceedings involving the personal representative are pending in the court three (3) months after the closing statement is filed, the appointment of the personal representative terminates.

Id. (Emphasis highlights new changes).

Recent Developments in Property Law

WALTER W. KRIEGER*

I. ADVERSE POSSESSION

A. Background

To defeat the title of an owner of record, an adverse claimant's possession must be actual, visible, notorious, exclusive, under a claim of ownership, hostile to the true owner, and continuous for the ten-year statutory period.¹ Additionally, Indiana Code section 32-1-20-1 requires that the adverse claimant pay all taxes and special assessments on the land during the statutory period of his adverse possession.²

B. Hostile and Under Claim of Right

In *Estate of Mark v. H.H. Smith Co.*,³ two brothers, Jeffrey and Martin Mark, formed a partnership, H.H. Smith Company, to sell barber and beauty shop equipment. In 1956, Martin purchased the real estate at issue. The same year, H.H. Smith moved into the building located on the property and Jeffrey, the sole acting partner, had the locks changed. Martin was not given a key. Jeffrey has been in possession of the building since 1957 and has made significant improvements. Title to the real estate was still in Martin's name at the time of his death in 1983. H.H. Smith and Jeffrey Mark brought this action to determine the interest of Martin Mark's estate in the property and the improvements. After a trial, the court ruled that the estate had

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1. *Estate of Mark v. H.H. Smith Co.*, 547 N.E.2d 796, 799 (Ind. 1989); *Smith v. Brown*, 126 Ind. App. 545, 552, 134 N.E.2d 823, 826 (1956). The Indiana courts frequently vary the wording slightly in describing the elements of adverse possession. See, e.g., *McCarty v. Sheets*, 423 N.E.2d 297, 300 (Ind. 1981) (open, continuous, exclusive, adverse, and notorious); *Worthley v. Burbank*, 146 Ind. 534, 539, 45 N.E. 779, 781 (1897) (hostile and under claim of right, actual, open and notorious, exclusive and continuous).

2. IND. CODE § 32-1-20-1 (1988). In boundary line disputes, however, Indiana courts have held that the statutory requirement that the claimant pay taxes is inapplicable because both parties believe they are paying taxes on the disputed portion. See, e.g., *Echerling v. Kalvatis*, 235 Ind. 141, 146, 126 N.E.2d 573, 575 (1955); *Kline v. Kramer*, 179 Ind. App. 592, 386 N.E.2d 982 (1979).

3. 547 N.E.2d 796 (Ind. 1989).

no interest in the property and that Jeffrey had acquired title by adverse possession.⁴ The court of appeals affirmed the judgment, holding that the trial court's findings of fact were sufficient to establish that Jeffrey's possession was hostile and exclusive.⁵

On petition to transfer, the Indiana Supreme Court observed that record title is the highest evidence of ownership, and that mere possession, regardless of the length of time, will not defeat the title.⁶ In order for possession to defeat record title, a plaintiff must prove every element of adverse possession.⁷

In discussing the requirement that adverse possession must be hostile and under a claim of ownership the court remarked:

Possession must be accompanied by a claim of ownership adverse to the true owner. It is not enough that the occupier feels or thinks he is the owner or even declares he is the owner. *His claim of ownership must be based on some ground justifying that conclusion* and it must be communicated to the true owner that the occupier makes such a claim that is adverse or hostile to his ownership.⁸

The court also indicated that the possession must be of such a nature that a reasonable owner would be aware that a claim is being made against his title. "It must be proven that adverse possession, that is, possession with a claim of ownership exclusive of everyone including the true owner is open and notorious to the extent that the true owner is, or should be aware of it."⁹ When the entry upon the

4. *Id.* at 797-98.

5. *Id.* at 799.

6. *Id.* at 800. Indiana courts have often remarked that "record title is the highest form of ownership," whereas "mere possession is the lowest evidence of ownership." *McCarty v. Sheets*, 423 N.E.2d 297, 300 (Ind. 1981); *Carter v. Malone*, 545 N.E.2d 5, 6 (Ind. Ct. App. 1989); *Philbin v. Carr*, 75 Ind. App. 560, 582, 129 N.E. 19, 27 (1920).

7. *Estate of Mark*, 547 N.E.2d at 799-800.

8. *Id.* at 800 (emphasis added). This language appears to require that the claimant's possession be based on a good faith belief that he or she is the owner of the land. Most Indiana decisions have not inquired as to the claimant's state of mind and several decisions have concluded that the terms "under claim of right" or "under claim of ownership" mean only that the possession must be hostile or adverse and do not create an additional element of adverse possession. *Poole v. Corwin*, 447 N.E.2d 1150, 1152 n.1 (Ind. Ct. App. 1983); *Kline v. Kramer*, 179 Ind. App. 592, 599, 386 N.E.2d 982, 988 (1979). The few cases addressing the issue of good faith are not in agreement. *Compare* *Pennington v. Flock*, 93 Ind. 378, 382-83 (1883) (in making his entry upon the land the claimant must act bona fide, believing that the land is his and that he has title) *with* *May v. Dobbins*, 166 Ind. 331, 333, 77 N.E. 353, 354 (1905) (title by adverse possession is predicated upon the statute of limitations without reference to the good or bad faith of the adverse claimant; good faith may accord with good morals but it is not the law).

9. *Estate of Mark*, 547 N.E.2d at 800.

land is permissive and subordinate to the title of the record owner, the statutory period does not begin to run until the occupant clearly and unequivocally disclaims and disavows the title of the true owner.¹⁰

The supreme court disagreed with the court of appeals and found that the trial court's findings of fact were not sufficient to establish that Jeffrey's possession was hostile and exclusive. Instead, the court found that the findings of the trial court were both contradictory and in conflict with the evidence.¹¹ In Finding 4, the trial court found that the insurance, taxes, and depreciation on the building were taken as expenses and deductions on the partnership tax returns, while in Findings 13 and 14 the trial court indicated that Jeffrey had insured the building since 1956 and had paid all taxes since 1970.¹² The trial court's Finding 10 stated that the partnership tax returns reflected a 100% ownership of H.H. Smith by Jeffrey.¹³ However, the returns actually reflected that Martin and Jeffrey were still partners, but that Jeffrey was entitled to 100% of the profits.¹⁴ Finding 12 stated that after the locks were changed, Martin never possessed a key and "thereby was denied access to the building."¹⁵ In the court's opinion this conclusion was unwarranted.¹⁶ The evidence simply indicated that the locks were changed because there was a problem with the locks, and that after they were changed Jeffrey did not give Martin a key. No evidence suggested that the locks were changed with an intent to exclude Martin or that Jeffrey's occupancy had changed from permissive to adverse.¹⁷

Furthermore, the supreme court found no evidence to support the conclusion in Finding 16 that Jeffrey considered himself the owner of the building. Instead, Jeffrey testified that he never told his brother that he was the owner of the property or that he was making a claim to the title.¹⁸ Jeffrey admitted that his possession in 1956 was permissive,

10. *Id.* (citing *Poole v. Corwin*, 447 N.E.2d 1150 (Ind. Ct. App. 1983)).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 800-01. Although the court did not believe the fact that Jeffrey was entitled to 100% of the profits prevented the existence of a partnership, numerous cases have held that the sharing of profits and losses is an essential element of a partnership. *E.g.*, *Watson v. Watson*, 331 Ind. 893, 108 N.E.2d 893 (1952) (a partnership is a community of interests in both the property and profits of a common business); *Kopka v. Yockey*, 76 Ind. App. 218, 131 N.E. 828 (1921) (the ultimate test of a partnership is the co-ownership of the profits of a business); *Breinig v. Sparrow*, 39 Ind. App. 455, 80 N.E. 37 (1907) (a partnership is the sharing, as common owners, of the profits of a business).

15. *Estate of Mark*, 547 N.E.2d at 801.

16. *Id.*

17. *Id.*

18. *Id.*

and he attempted to introduce evidence that he was purchasing the building from Martin under an oral contract; however, the trial court excluded this testimony under the Dead Man's Statute.¹⁹

The opinion of the court of appeals was vacated, and the judgment of the trial court reversed with directions to enter judgment for the estate.²⁰

C. *Exclusive*

In *Marathon Petroleum Co. v. Colonial Motel Properties, Inc.*,²¹ the Colonial Corporation conveyed a .867 acre tract of land to Marathon Petroleum Company's predecessor, the Ohio Oil Company. Six years later, in 1968, the Colonial Corporation conveyed an adjacent 7.746 acre tract to the Perrys, who then operated a motel on the property. In 1977, the Perrys transferred the title to the property to their newly formed corporation, United Family Properties, Inc., and in 1986, the Perrys formed Colonial Motel Properties, Inc. (Colonial), which acquired the title to the property from United.²²

At the time the Perrys purchased the land, they decided to expand their motel business by appealing to trailer truck drivers. To accommodate the trucks, the Perrys constructed a parking lot on the southern portion of their property, by filling a .27 acre portion of Marathon's property (the disputed area) with rock and dirt. A sign, visible from the Marathon property, read: "Free Parking for Colonial Inn Motel Guests Only. All Others \$20.00 per night. Violators impounded at owner's expense! All vehicles must register."²³

The Perrys employed a security guard to protect the trucks and to insure that all trucks were properly registered. On occasion, truck drivers using a nearby motel would park in the lot, and when it was discovered that they were not registered they were asked to leave.²⁴

In April 1986, the Perry's attorney wrote a letter to Marathon stating that Colonial was not claiming title to the disputed area and wished to continue the use of the land with Marathon's permission.²⁵ In September 1987, Marathon initiated an action to quiet title to the disputed area and for ejectment. The court denied Marathon's motions

19. *Id.*

20. *Id.* at 802.

21. 550 N.E.2d 778 (Ind. Ct. App. 1990).

22. *Id.* at 780.

23. *Id.*

24. *Id.*

25. *Id.*

for a summary judgment and directed verdict.²⁶ The jury found in favor of Colonial and Marathon appealed.²⁷

On appeal, Marathon argued that its motion for summary judgment should have been granted because the use of the disputed area by Colonial customers was insufficient as a matter of law to establish title by adverse possession. As authority for its position, Marathon cited *Greenco, Inc. v. May*.²⁸ In *Greenco*, customers of May's restaurant, located adjacent to the Greenco parking lot, and members of the general public had used the lot for parking for more than thirty years. May leveled and graded the lot but did not claim an exclusive right for her customers to park in the lot. The court in *Greenco* found that routine and regular use by members of the general public cannot create a prescriptive easement.²⁹ In distinguishing *Greenco*, the court of appeals noted that neither May nor the prior owners of the restaurant had ever claimed an exclusive right to use the lot, and that Greenco customers and members of the general public also used the lot.³⁰ On the other hand, Colonial claimed an exclusive right to use the lot and posted signs indicating the parking lot was for use by its customers only.³¹ In addition, it employed a security guard to ensure that all trucks using the lot were registered. These acts of ownership clearly distinguished this case from *Greenco*.³² Thus, the trial court properly refused to give Marathon's tendered instruction that "[m]embers of the general public cannot, by routine and regular use, confer adverse possession rights on Colonial."³³

Marathon also claimed that the standard of proof required to demonstrate title by adverse possession is higher when a grantor or one in privity with a grantor claims title by adverse possession against a grantee. The court acknowledged the general rule that when a grantor or one in privity with a grantor remains in possession of land, the law will presume it is with the grantee's permission.³⁴ But, the court noted that in this case the deeds from the Colonial Corporation did not convey the same tract of land to Marathon and the Perrys. In

26. *Id.*

27. *Id.*

28. *Id.* at 782 (citing *Greenco Inc. v. May*, 506 N.E.2d 42 (Ind. Ct. App. 1987)).

29. Although *Greenco* involved a prescriptive easement, the court found that the elements required to establish a prescriptive easement are essentially the same as those needed to establish adverse possession. *Marathon*, 550 N.E.2d at 782 n.2.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 784.

34. *Id.* at 782-83.

fact, the Perrys' deed explicitly excluded from the conveyance the .867 acre tract previously conveyed to Marathon.³⁵

Finally, Marathon contended that the letter written by the Perrys' attorney, admitting that the use of the property was with Marathon's permission, estopped the Perrys' adverse possession claim. In rejecting this argument, the court noted that once the Perrys had satisfied the elements of adverse possession for the statutory period, title to the disputed tract vested in them by operation of law, and any subsequent admission or offer to purchase the land from the record owner could not divest them of the title.³⁶

The court concluded that Colonial had presented sufficient evidence of adverse use for the statutory period to submit the case to the jury and that the trial court had properly denied Marathon's motions for summary judgment and for a directed verdict.³⁷

*D. Periodic or Sporadic Acts of Ownership:
Requirement of Established Use Line*

In *Beaver v. Vandall*,³⁸ William and Darlene Beaver owned a five-acre tract of land. In February 1974, they sold a house and a lot to John and Elaine Vandall (the Vandalls). After the sale, the Vandalls asked William Beaver to clear the strip along the northern boundary of their lot. Beaver claimed he cleared the trees and brush some distance beyond the northern boundary of the lot to make the boundary line clear to both parties. The Vandalls contended that by clearing the area beyond the boundary line in the deed he indicated an intent for them to have the entire area cleared.³⁹

John Vandall leveled and seeded the cleared area. He also replaced a propane gas tank located on the disputed area and built a fence around it. Later, after natural gas service was provided to the house, the tank was removed, and in the summer of 1977, Vandall built a small utility shed on the site where the tank had stood. The parties did not consider the propane gas tank nor the utility shed to be permanent improvements. Evidence existed that at one time, a fence

35. *Id.*

36. *Id.* at 783 (citing *Kline v. Kramer*, 179 Ind. App. 592, 597, 386 N.E.2d 982, 987 (1979)). There was conflicting evidence as to whether the attorney in fact had either actual or implied authority to write the letter, but the court found this issue was not dispositive because once title had vested in the occupant at the conclusion of the statutory period for adverse possession, title could not be lost by an admission or an offer to buy the property. *Marathon*, 550 N.E.2d at 783 n.4.

37. *Id.* at 783-84.

38. 547 N.E.2d 802 (Ind. 1989).

39. *Id.* at 802-03.

on the Vandalls' property encroached upon the disputed area but it did not extend to or from the northern boundary of the disputed area.⁴⁰

The Beavers testified that between 1979 and 1981, they noticed the Vandalls were encroaching further and further onto their property. A survey conducted by the Beavers located the northern boundary of the Vandalls' lot, and stakes were placed evidencing the boundaries. The stakes were subsequently removed. In 1985, the Beavers brought an action to quiet title to the disputed area.⁴¹ The trial court found that the Vandalls had acquired title to the disputed strip by adverse possession.⁴² The court of appeals affirmed.⁴³ However, in a dissenting opinion, Judge Hoffman concluded that plowing, grading, seeding, mowing, fertilizing, planting a small tree, and placing a water meter in the disputed area was not sufficient to establish adverse possession.⁴⁴ No fence was ever built or maintained on the disputed area, no permanent structures were erected, and no temporary structure existed on the disputed area for the required ten-year period.⁴⁵

The Indiana Supreme Court granted transfer and indicated its agreement with Judge Hoffman's dissent.⁴⁶ The court cited *McCarty v. Sheets*⁴⁷ and *Greene v. Jones*⁴⁸ as authority for the position that casual maintenance activities in a residential area, standing alone, are insufficient to support a claim of adverse possession.

The court was concerned that sporadic and casual acts of possession might fail to inform the record owner that a claim was being made: "Where there has been no actual notice, the possession must have been so notorious as to warrant the inference that the owner ought to have known that a stranger was asserting dominion over his land."⁴⁹ The Beavers admitted that in 1979 they became aware that an adverse claim was being made, but that because this action was brought in

40. *Id.* at 803.

41. *Id.*

42. *Id.* at 802.

43. *Beaver v. Vandall*, 532 N.E.2d 627 (Ind. Ct. App. 1988) (unpublished opinion).

44. *Beaver*, 547 N.E.2d at 803.

45. *Id.*

46. *Id.*

47. 423 N.E.2d 297 (Ind. 1981). In *McCarty*, a unanimous court concluded that mowing, weeding, and fertilizing a strip of land was not sufficient to establish title by adverse possession and that only the area actually encroached upon by a garage had been acquired by adverse possession. *Id.* at 300. To adversely establish possession, a plaintiff must show "palpable and continuing" acts of ownership claimed for the statutory period. *Id.*

48. 490 N.E.2d 776 (Ind. Ct. App. 1986). In *Greene*, the court of appeals held that casual maintenance involving maintenance tasks are not sufficient to establish title by adverse possession. *Id.* at 779.

49. *Beaver*, 547 N.E.2d at 804 (citing *Philbin v. Carr*, 75 Ind. App. 560, 584-85, 129 N.E. 19, 28 (1920)).

1985, it was well within the statutory ten-year period for the recovery of possession of property. The case was remanded with directions that the trial court enter judgment for the Beavers.⁵⁰

The question of sporadic acts of ownership was also presented in *Carter v. Malone*.⁵¹ In 1971, the Malones built a garage that encroached 1.2 feet onto an adjoining vacant lot. In 1981, the Carters purchased the adjoining vacant lot. Before surveying their lot in 1984, the Carters offered to purchase a four foot strip of the disputed area from the Malones. In refusing the Carters' offer to purchase, Edward Malone stated, "No, because we own out to the hedges and we have been taking care of 'em."⁵² The subsequent survey revealed the encroachment of the Malones' garage and that the Malones' house was less than four feet from their property line.⁵³

In 1987, the Malones filed a complaint for adverse possession of a seven-foot-wide strip of property on the Carters' lot.⁵⁴ The evidence showed a row of trees and bushes existed on the Carters' lot and that since 1970 the Malones had trimmed the trees and hedges and mowed the grass around the trees. The trial court awarded the Malones title to the mid-line of the tree and hedge row, concluding that there were sufficient acts of adverse possession in the disputed area since 1970.⁵⁵ The trial court also indicated that the plaintiffs' claim was substantiated by the Carters' offer to purchase a portion of the disputed area and by the encroachment of the Malones' garage.⁵⁶

On appeal the court observed that the adverse possessor's claim must be limited to that portion over which he exercises palpable and continuing acts of ownership.⁵⁷ The court relied on *McCarty*. In *McCarty*, the court remarked that "where the quantity of land involved is small, the rule as to the location of the line is exacting; possession to the line during all the (statutory) period must be definitely shown."⁵⁸

Here, the court found that the activities in the disputed area were not sufficient to establish adverse possession:

The Malones' claim to the strip of land was based on sporadic acts of maintenance and a verbal response to the Carters'

50. *Id.* at 805.

51. 545 N.E.2d 5 (Ind. Ct. App. 1989).

52. *Id.* at 7.

53. *Id.* at 6-7.

54. *Id.* at 6.

55. *Id.*

56. *Id.*

57. *Id.*

58. *McCarty*, 423 N.E.2d at 300 (citing *Baxter v. Girard Trust Co.*, 288 Pa 256, 260, 135 A. 620, 621 (1927)).

mistaken offer to purchase. Periodic acts of yard-work and a verbal claim in response to a mistaken offer to purchase do not establish palpable, continuing or exacting acts of ownership sufficient to constitute adverse possession.⁵⁹

The Malones argued that the row of trees and bushes established a possession or use line that supported their claim of open and continuous use of the disputed strip. The court acknowledged that a possession or a use line is a factor in determining adverse possession,⁶⁰ citing *Oswald v. Paston*.⁶¹ In *Oswald*, a surveyor testified that he noticed a use line and that there was evidence that the adverse possessor had mowed, fertilized, and planted flowers and a tree in the disputed strip. In addition, in *Oswald* the adverse possessor had trucks drive onto the disputed area to deliver fill dirt, maintained a seawall in the disputed area, and ordered a worker for the record titleholder off the disputed land. The court in *Carter* went to some length to distinguish *Oswald*:

In contrast, the Malones did not have a surveyor testify that a use or possession line existed. The row of trees and bushes grew wild, were noncontinuous and had gaps where people could walk back and forth. When the Carters cut down trees, planted grass, trimmed bushes, built a partial fence and cement stoop in the disputed area the Malones did not protest.⁶²

The Indiana Supreme Court reversed the trial court and held that there was sufficient evidence of adverse possession of the area occupied by the garage, but that the trial court erred in awarding the Malones more land than was actually occupied by the garage.⁶³

II. CONCURRENT ESTATES

In Indiana, a conveyance of real property to a husband and wife, without indication of a contrary intent, creates a tenancy by the entirety.⁶⁴ A tenancy by the entirety, unlike a joint tenancy or a tenancy in common, is owned by a husband and wife as one (*pur tout et non pur my*) and neither spouse has an individual interest in the property

59. *Carter*, 545 N.E.2d at 7.

60. *Id.*

61. 509 N.E.2d 217, 220 (Ind. Ct. App. 1987).

62. *Carter*, 545 N.E.2d at 7.

63. *Id.*

64. See *Dotson v. Faulkenburg*, 186 Ind. 417, 116 N.E. 577 (1917); *Arnold v. Arnold*, 30 Ind. 305 (1868); *Richards v. Richards*, 60 Ind. App. 34, 110 N.E. 103 (1915).

that a creditor of only one of the spouses may attach.⁶⁵ In general, Indiana does not recognize tenancy by the entirety as to personalty,⁶⁶ but Indiana has made an exception with the proceeds from the sale of land held by the entirety.⁶⁷ During this survey period, two cases touched upon the nature of the tenancy by the entirety. In *In re Guardianship of Bramblett*,⁶⁸ the court held that the surviving spouse was entitled to the proceeds from the sale of entirety property sold by court order; and in *Rhodes v. Indiana National Bank*,⁶⁹ the court held that a creditor of the husband could reach one-half the rental income received from property held by the entirety.

Prior to enactment of the multiple-party account statute,⁷⁰ survivorship rights in joint bank accounts were complicated by the law of gifts. Often the circumstances suggested that the person placing the property into a joint account intended only to part with dominion and control of the property at death and failed to meet the requirement of present transfer necessary to establish an inter vivos gift.⁷¹ Although this problem has been eliminated in multiple-party bank accounts by the statute, which creates a contractual right of survivorship, the problem may still arise in other types of jointly owned property. In *In re Estate of Langley*,⁷² the Indiana Court of Appeals, using a contractual theory, found a right of survivorship in the contents of a jointly owned safe deposit box.

A. Proceeds From Sale of Entirety Property Sold Under Court Order in Guardianship Proceeding

In *In re Guardianship of Bramblett*,⁷³ James and Mary Bramblett owned real estate in tenancy by the entirety. In 1988, James's health began to fail and before he entered a nursing home in the spring of that year, James and Mary signed a listing agreement to sell their real

65. See *Patton v. Rankin*, 68 Ind. 245 (1879); *Mercer v. Coomler*, 32 Ind. App. 533, 69 N.E. 202 (1903).

66. See *Koehring v. Bowman*, 194 Ind. 433, 142 N.E. 117 (1924); *Schoon v. Van Diest Supply Co.*, 511 N.E.2d 12 (Ind. Ct. App. 1987).

67. See *Whitlock v. Public Service Co.*, 239 Ind. 680, 159 N.E.2d 280 (1959), *reh'g denied*, 239 Ind. 694, 161 N.E.2d 169 (1959); *Abshire v. State*, 53 Ind. 64 (1876); *Anuszkiewicz v. Anuszkiewicz*, 172 Ind. App. 279, 360 N.E.2d 230 (1977).

68. 549 N.E.2d 56 (Ind. Ct. App. 1990).

69. 544 N.E.2d 179 (Ind. Ct. App. 1989).

70. IND. CODE §§ 32-4-1.5-1 to -15 (1988).

71. Poland, 1975 *Indiana Survey of Trusts and Decedents' Estates*, 10 IND. L. REV. 392, 399-400 (1976).

72. 546 N.E.2d 1287 (Ind. Ct. App. 1989).

73. 549 N.E.2d 56 (Ind. Ct. App. 1990).

estate.⁷⁴ In May 1988, Mary was appointed guardian of the person and estate of James, and she petitioned the court for permission to complete the sale of the real estate. The court approved the sale and, upon the filing of a "Petition to Withhold and Disburse Funds" by Mary, the court directed that the proceeds of the sale be distributed to Mary in her individual capacity as the spouse of the ward, subject to monthly disbursements to the guardianship account for James's care and maintenance.⁷⁵ James died intestate one month later, survived by Mary and three children from a prior marriage. One of the children, Mark, was appointed administrator of the estate. Mary filed a guardian's final report and a petition to terminate the guardianship. The court approved the final accounting and terminated the guardianship *ex parte*.⁷⁶ No formal notice was given to Mark or the other children. On petition by the children to reconsider its order approving the final report, the court vacated its order and directed that the proceeds from the sale of the real estate be allocated one-half to the guardianship estate and one-half to Mary.⁷⁷ The court specifically held that the proceeds from the sale of the entirety property were not imprinted with the same right of survivorship as was the real estate itself.⁷⁸

On appeal, the Indiana Court of Appeals observed that in *Whitlock v. Public Service Company of Indiana*,⁷⁹ the Indiana Supreme Court held that "Indiana law impresses the proceeds from property held by the entireties with the rights of survivorship, the same as the original property from which it came."⁸⁰ *Whitlock* indicated, however, that the proceeds will be considered held by the entirety

only so long as the proceeds are intact and have not been divided or disbursed. Once the proceeds have lost their identity as a separate res held by the entireties, certainly the principles of tenancy by entireties can no longer apply, any more than they can apply to the real estate which has been sold or transferred.⁸¹

The children argued⁸² that one-half of the proceeds should be

74. *Id.* at 57.

75. *Id.* at 57-58.

76. *Id.* at 58.

77. *Id.*

78. *Id.*

79. 239 Ind. 680, 159 N.E.2d 280 (1959).

80. *Bramblett*, 549 N.E.2d at 59 (quoting *Whitlock*, 239 Ind. at 690, 159 N.E.2d at 285).

81. *Whitlock*, 239 Ind. at 691, 159 N.E.2d at 285.

82. The children cited *Anuszkiewicz v. Anuszkiewicz*, 172 Ind. App. 279, 360 N.E.2d

allocated to James's estate.⁸³ In reversing the trial court, the court held that the children were not entitled to one-half of the proceeds because Mary had kept the funds intact for the care and maintenance of James and herself.⁸⁴ Thus, Mary was entitled to all of the proceeds.⁸⁵

B. Rental Income From Entirety Property: Creditors' Rights

In *Rhodes v. Indiana National Bank*,⁸⁶ Harold and Betty Rhodes owned rental property as tenants by the entirety. A judgment creditor of the husband sought to garnish his half of the rental income due both spouses from the tenancy by the entirety real estate. The trial court held that one-half of the rent could be attached for the individual debt of the husband.⁸⁷

On appeal, the Rhodeses argued that the rent retained the characteristic of the entirety property and could not be attached by a creditor of only one of the spouses. The Court of Appeals, however, refused to extend the entirety exemption to rental income from the real property.⁸⁸ The court recognized:

Estates by entireties do not exist as to personal property except when such property is directly derived from real estate held by that title, as crops produced by the cultivation of lands owned by the entireties or proceeds arising from the sale of property [i.e., real estate] so held.⁸⁹

The court also noted that the recent decision of *Schoon v. Van Diest Supply Co.*,⁹⁰ held that proceeds from the sale of crops grown on entirety real estate were not protected from the claims of a creditor of one of the spouses.⁹¹ In affirming the lower court, the *Rhodes* court concluded that profits derived from the ownership of entirety property are subject to the claims of a creditor of either spouse.⁹²

230 (1977), to support their position. In *Anuszkiewicz*, the husband deposited one-half of the proceeds from the sale of the entirety property into a joint account with his son. The court held that this action changed the character of the proceed from entirety property to personalty and that, at her husband's death, the wife was not entitled to the one-half of the proceeds in the joint account. *Id.* at 283, 360 N.E.2d at 233.

83. *Bramblett*, 549 N.E.2d at 59-60.

84. *Id.* at 60.

85. *Id.*

86. 544 N.E.2d 179 (Ind. Ct. App. 1989).

87. *Id.* at 180.

88. *Id.*

89. *Id.* (quoting *Koehring v. Bowman*, 194 Ind. 433, 437, 142 N.E. 117, 118 (1924)).

90. 511 N.E.2d 12 (Ind. Ct. App. 1987).

91. *Rhodes*, 544 N.E.2d at 180.

92. *Id.*

*C. Joint Rental of Safe-Deposit Box:
Right of Survivorship*

In *In re Estate of Langley*,⁹³ Cecilia Highman, the surviving co-lessee of a safe deposit box sued the estate of the deceased co-lessee, Bessie Langley, to recover the contents of the box at the time of Langley's death. In 1974, Highman and Langley, who had been friends for nearly forty years, jointly rented a safe deposit box at a bank. Both parties signed a contract that contained the following language:

[S]aid Safe and its contents during their joint lives shall be held and owned by them jointly and severally, and either of them without the other may have access to, and may surrender said Safe, and *upon the death of either, the Safe, its entire contents, and all right of access thereto, shall belong exclusively to the survivor or survivors.*⁹⁴

Langley entered the box nineteen times before her death in 1986. She placed various items in the box including abstracts, deeds, and \$7,500 in cash. Highman entered the box only twice during Langley's lifetime, once when the box was originally opened and once when she placed \$2,500 in the box. Langley died on October 26, 1988, and Sherry Schafer, the personal representative of Langley's estate, obtained a restraining order against Highman, preventing her from removing the contents of the safe deposit box. Highman filed a motion to compel Schafer to surrender the funds, but the trial court held that Highman was entitled only to \$2,500 and that the estate was entitled to the other items in the box.⁹⁵

On appeal, Highman claimed the right to the contents of the box under a contractual theory, although prior Indiana decisions had used a gift theory to decide the right of a surviving co-lessee to the contents of a safe deposit box. Finding no Indiana decisions addressing a contractual theory of survivorship rights, the Indiana Court of Appeals turned to authority from other jurisdictions. The court observed that the majority of jurisdictions has held that a joint lease of a safe deposit box does not create a per se right of survivorship in the contents of the box unless the lease agreement contains specific language indicating joint tenancy or right of survivorship.⁹⁶ Here, the parties signed a lease agreement specifically stating that the safe and its entire contents shall

93. 546 N.E.2d 1287 (Ind. Ct. App. 1989).

94. *Id.* at 1288 (emphasis added).

95. *Id.* at 1288-89.

96. *Id.* (citing Annotation, *Survivor's Rights to Contents of Safe-Deposit Box Leased or Used Jointly with Another*, 14 A.L.R.2d 948, 954 (1950)).

belong to the survivor. The court found that the agreement sufficiently established intent to create a joint tenancy with right of survivorship, and thus passed the contents of the safe to Highman at Langley's death.⁹⁷

III. COVENANTS OF TITLE

In *McClaskey v. Bumb & Mueller Farms, Inc.*,⁹⁸ the Hudsons conveyed a tract of land to McClaskey by warranty deed. The State of Indiana had acquired a 125-foot highway easement over the tract of land. Subsequently, as part of a project to make U.S. 41 a limited access highway, the State began proceedings to condemn the portion of McClaskey's real estate that abutted U.S. 41, excluding the easement. Upon discovery of the exclusion of the easement, McClaskey cross-claimed against the Hudsons for breach of their warranty of title in the deed. Both parties moved for summary judgment, and the trial court granted the Hudsons' motion.⁹⁹ McClaskey appealed.¹⁰⁰

In an unusual argument, the Hudsons contended they had not breached their warranty of title because they had produced a "marketable record title" under the Indiana Marketable Title Act.¹⁰¹ The Act provides as follows:

Any person who has an unbroken chain of title of record to any interest in land for fifty [50] years or more shall be deemed to have a marketable record title to such interest as defined in section 8 [32-1-5-8], *subject only to the matters stated in section 2 [32-1-5-2] hereof*.¹⁰²

Even a cursory glance at the interests exempted by Indiana Code section 32-1-5-2 from the operation of the Marketable Title Act indicates that a "marketable record title" is not the equivalent of a "marketable title" guaranteed by a warranty deed. The ability to trace an unbroken chain of title back to a title transaction at least fifty years old does

97. *Langley*, 546 N.E.2d at 1290. One unanticipated problem that might arise from this decision is when a husband and wife place their separately owned property in a jointly owned safe deposit box. The individual property of each might be intended for inclusion in a by-pass or shelter trust but, under the ruling in this case, it would pass to the surviving spouse under the contract unless a different intent could be established.

98. 547 N.E.2d 302 (Ind. Ct. App. 1989).

99. *Id.* at 303.

100. *Id.*

101. *Id.* at 304 (citing IND. CODE §§ 32-1-5-1 to -10 (1988)).

102. IND. CODE § 32-1-5-1 (1988) (emphasis added).

not insure that the title is free and clear of all claims and interests.¹⁰³ In order to harmonize the Marketable Title Act with the warranties contained in the statutory form warranty deed,¹⁰⁴ the court concluded that "the Marketable Title Act relieves the covenants imposed by a warranty deed only to the extent that a claim or interest is extinguished by the Marketable Title Act."¹⁰⁵

Finally, the Hudsons claimed that because U.S. 41 was in existence at the time of the conveyance, McClaskey had an obligation to make a reasonable inquiry concerning the extent of the easement before he purchased the property.¹⁰⁶ The court did not directly address the issue of inquiry notice, but instead observed that "McClaskey did not have actual knowledge of the easement and the existence of the easement was not disclosed in his abstract of title."¹⁰⁷ Even if McClaskey was charged with inquiry notice of the easement, Indiana courts have held that knowledge of an existing defect in the title at the time of purchase does not estop the grantee from suing under a covenant against encumbrances contained in the warranty deed.¹⁰⁸

The court of appeals indicated that the transferor under a warranty deed guarantees that the property is "free from all encumbrances and that he will warrant and defend the title to the same against all lawful claims."¹⁰⁹ An existing highway easement is a breach of the covenant against encumbrances.¹¹⁰ Thus, the court reversed the trial court with instructions to enter summary judgment for McClaskey.¹¹¹

IV. DAMAGES TO REAL ESTATE

In *Neal v. Bullock*,¹¹² Edward Bullock owned two mature apple trees in his backyard, which provided shade and fruit, and which were aesthetically pleasing to him. The trees died after Bullock's neighbor, Eddie Neal, burned some trash in his own backyard. Bullock brought suit in a small claims court for the replacement value of the trees.

103. Arguably, under the Marketable Title Act an easement of record, even though recorded prior to the root of title, would not be destroyed.

104. IND. CODE § 32-1-2-12 (1988).

105. *McClaskey*, 547 N.E.2d at 304.

106. *Id.*

107. *Id.* at 304-05.

108. *E.g.*, *Watts v. Fletcher*, 107 Ind. 391, 8 N.E. 111 (1886); *Burk v. Hill*, 48 Ind. 52 (1874); *Whitern v. Kirck*, 31 Ind. App. 577, 68 N.E. 694 (1903); *Teague v. Whaley*, 20 Ind. App. 26, 50 N.E. 41 (1898).

109. *McClaskey*, 547 N.E.2d at 304. The court took this language from the statutory form warranty deed contained in IND. CODE § 32-1-2-12.

110. *McClaskey*, 547 N.E.2d at 304 (citing *Burke v. Hill*, 48 Ind. 52 (1874)).

111. *Id.* at 305.

112. 538 N.E.2d 308 (Ind. Ct. App. 1989).

After a hearing, in which evidence was introduced as to the cost of replacing the trees, the court awarded Bullock \$3000, the jurisdictional limit of the small claims court at that time, plus costs.¹¹³

On appeal, Neal argued that the proper measure of damages was the difference between the market value of the real estate before and after the injury, not the replacement value of the trees. The court of appeals agreed that after trees are planted, they are part of the real estate and are not personal.¹¹⁴ However, the court observed that in *General Outdoor Advertising Co. v. La Salle Realty Corp.*,¹¹⁵ the court of appeals held that the measure of damages for an injury to real estate depends upon a determination of whether the injury is permanent or temporary.¹¹⁶ The court in *Neal* stated that "[a] permanent injury is one in which the cost of restoration of the property to its pre-injury condition exceeds the market value of the real estate prior to injury. A temporary injury is one which is not permanent."¹¹⁷ The court reasoned that because the owner in this case sought to recover the replacement value of the trees, the owner did not consider the damages permanent.¹¹⁸ The burden of establishing that the damage is permanent is on the party seeking to invoke a market value formulation of damages.¹¹⁹ Because Neal did not introduce any evidence of market values, he failed to carry his burden of proof; therefore, the court affirmed the trial court's judgment for Bullock.¹²⁰

V. LANDLORD AND TENANT

A. *Percentage Rental Agreement*

In *Casa D'Angelo, Inc. v. A & R Realty Co.*,¹²¹ Casa D'Angelo, Inc., an Italian restaurant business, sublet a building owned by A & R Realty Company (A & R) in Fort Wayne, Indiana. The sublease provided for a base rent of \$825 per month and an additional rent in the amount of five percent of the gross sales over \$200,000 a year. In 1978, Casa D'Angelo agreed to lease the building directly from A & R. The new lease was from July 5, 1978 to November 1, 1982, with

113. *Id.* at 308-09.

114. *Id.* at 309.

115. 141 Ind. App. 247, 218 N.E.2d 141 (1966).

116. *Neal*, 538 N.E.2d at 309.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. 553 N.E.2d 515 (Ind. Ct. App. 1990).

an option to renew for an additional five-year term. Although the owners of Casa D'Angelo had no experience in the restaurant business, they exceeded \$200,000 in gross sales every year from 1978 through 1986 and paid approximately \$161,000 in percentage rent to A & R.¹²²

In 1982, Casa D'Angelo opened a second restaurant in Fort Wayne. In 1985, the owners of Casa D'Angelo agreed to take over a third restaurant operated by the son of one of the partners of A & R. This restaurant, located within one mile of the A & R facility, re-opened under the name T.J. Pasta's. In August 1986, Casa D'Angelo entered into a lease for a fourth restaurant, also located within one mile of the A & R facility. The fourth restaurant was larger and had better parking facilities than the A & R facility. When the new restaurant was opened in December 1986, Casa D'Angelo changed its operations at the A & R facility. Casa D'Angelo moved its banquet and carry-out service, which constituted only a small part of its business, to the A & R facility, and ceased offering a full dinner menu to walk in customers. Those who came to the A & R facility seeking a full meal were directed to one of the other Casa D'Angelo restaurants.¹²³ Both the business hours and staff at the A & R facility were reduced. As a result of these changes, gross sales at the A & R facility decreased dramatically.¹²⁴ Casa D'Angelo continued to phase out its business at the A & R facility and permanently closed the restaurant in July 1987. In 1987, the A & R facility gross sales did not exceed \$200,000, and no percentage rent was paid by Casa D'Angelo, although it did continue to pay the base rent of \$825 per month until the lease terminated on November 1, 1987.¹²⁵

On July 1, 1987, A & R filed suit claiming that Casa D'Angelo had breached the express terms of the lease as well as an implied covenant of good faith to continue operating the restaurant in the same manner and during the same business hours as it had during the earlier years of the lease. Casa D'Angelo moved for summary judgment claiming that the undisputed facts failed to show any breach of an express or implied covenant in the lease.¹²⁶ The trial court denied the motion and the jury returned a verdict for A & R.¹²⁷

On appeal, Casa D'Angelo claimed that as a matter of law it did not violate any express or implied covenant in the lease and that the

122. *Id.* at 516-17.

123. *Id.* at 517. The menu to the walk-in customers at the A & R facility was limited to soup, salads, sandwiches, and full bar service. *Id.*

124. *Id.* Gross sales dropped from \$88,547.17 in November 1986 to \$15,355.77 in December 1986 and continued to decline in 1987. *Id.* at 517-18.

125. *Id.* at 518.

126. *Id.*

127. *Id.* at 516, 518.

substance of A & R's complaint was an alleged violation of an implied-in-fact covenant to generate a percentage rent. A & R argued that its complaint alleged a violation of an implied-in-law covenant of good faith. The court agreed with Casa D'Angelo and held that damages could be awarded only if Casa D'Angelo had a duty to operate the business in a manner so as to generate a percentage rent. Casa D'Angelo had continued to pay the base rent for the term of the lease. The only other tenant on the A & R property was a fabric store that competed with Casa D'Angelo for parking space and whose business was not enhanced by the continued operation of the restaurant.¹²⁸

The court observed that although a breach of an implied covenant of good faith may occur without the violation of an implied-in-fact covenant or express covenant, the breach of such a covenant requires "bad faith."¹²⁹ The court defined "bad faith" as the conscious doing of a wrong that "contemplates a state of mind affirmatively operating with furtive design or ill will."¹³⁰ No evidence existed that Casa D'Angelo changed its operation for a dishonest purpose or attempted to damage A & R by depriving it of its percentage rent.¹³¹

The court compared *F.W. Woolworth Co. v. Plaza North, Inc.*¹³² with *Casa D'Angelo, Inc.* In *F.W. Woolworth*, Plaza North claimed that the lessee had impliedly agreed to act in good faith not to deprive the lessor of its percentage rent. The court agreed, but found that Woolworth's decision to close its Woolco stores was based on economic considerations and was not done to deprive Plaza North of its percentage rent.¹³³ In *Casa D'Angelo, Inc.*, the court found that the operation was changed because Casa D'Angelo lacked sufficiently trained personnel and resources to continue operating the restaurant.¹³⁴ Casa D'Angelo did nothing more than exercise sound business judgment.¹³⁵

Before discussing the alleged breach of an implied covenant to generate percentage rent, the court first addressed A & R's claim that Casa D'Angelo had violated two express covenants in the lease. The provision read:

128. *Id.* at 518. The court seemed to suggest that if Casa D'Angelo had been an anchor or magnet tenant in a shopping center whose continuous operation was necessary to attract customers to other A & R tenants, then perhaps a duty to continue the business for the benefit of the other tenants could be implied. *Id.* at 521-22.

129. *Id.* at 519.

130. *Id.* (quoting *Vickers v. Motte*, 109 Ga. App. 615, 137 S.E.2d 77 (1964)).

131. *Id.*

132. 493 N.E.2d 1304 (Ind. Ct. App. 1986).

133. *Id.* at 1311.

134. *Casa D'Angelo, Inc.*, 553 N.E.2d at 519.

135. *Id.*

Use. Lessee shall use the premises for the operation of a restaurant facility and for no other purpose without first obtaining the written consent of Lessor thereof

Business Hours. Lessee shall keep the leased premises open for business during normal business hours for a restaurant.

A & R argued that the two provisions when read together required Casa D'Angelo to continuously operate the restaurant during normal business hours through the term of the lease. Casa D'Angelo contended that the use provision merely restricted the use of the premises and did not require it to operate a restaurant on the premises. The court agreed with Casa D'Angelo, concluding that generally a provision in a lease restricting the use of the premises to certain prescribed purposes does not create an affirmative duty to use the premises for such purposes.¹³⁶ The court further noted that the provision requiring the lessee to keep the premises open during "normal business hours" was not defined in the lease and that restaurants observe a wide variety of business hours.¹³⁷ Finally, the court concluded that even if the two provisions read together could be construed as creating an implied duty to continue to operate the restaurant throughout the term of the lease, damages would not exist unless Casa D'Angelo also had a duty to generate a percentage rent.¹³⁸

The court, having determined that no breach of an express provision existed, questioned whether there was an implied-in-fact covenant to generate a percentage rent.¹³⁹ The court remarked that covenants implied-in-fact are not favored by the law,¹⁴⁰ and quoted with approval the Oklahoma Supreme Court in *Mercury Investment Co. v. F.W. Woolworth Co.*:¹⁴¹

(1) [T]he obligation must arise from the presumed intention of the parties as gathered from the language used in the written instrument itself or it must appear from the contract as a whole that the obligation is indispensable in order to give effect to

136. *Id.* at 520.

137. *Id.* at 520 n.5.

138. *Id.* at 520.

139. *Id.* The court observed that a distinction exists between covenants implied-in-fact and those implied-in-law. The latter are implied from the relation of the parties and the objective of the agreement. Covenants implied-in-law are founded on public policy without regard to the intent of the parties. Covenants implied-in-fact are raised by inference from the words used in the agreement and are based on the intent of the parties. *Id.* at 520-21 (citing *Mercury Investment Co. v. F.W. Woolworth Co.*, 706 P.2d 523, 529 n.14 (Okla. 1985)).

140. *Casa D'Angelo, Inc.*, 553 N.E.2d at 521.

141. 706 P.2d 523 (Okla. 1985).

the intent of the parties; and (2) it must have been so clear with the contemplation of the parties that they deemed it unnecessary to express it.¹⁴²

The court examined decisions from other jurisdictions and concluded that generally when the base rent is substantial, courts have refused to find an implied covenant to generate percentage rent or to continuously operate a business.¹⁴³ Here, no evidence suggested that the base rent was not substantial.¹⁴⁴

A & R agreed that the base rent was substantial, but argued that the percentage rent was also substantial. The court acknowledged that:

[A] few courts have found an implied covenant to generate a percentage rent or to continue operation, even when the base rent is substantial, where the provisions of the lease and the surrounding circumstances at the time of its execution show that the parties intended the payment of a percentage rent or the continuous operation of the tenant's business to have been a substantial consideration for the lease.¹⁴⁵

However, the court found that Casa D'Angelo was a new venture and that the owners had no experience in operating a restaurant.¹⁴⁶ A good chance existed that the venture might fail and there was no reasonable basis for an expectation of a percentage rent. The substantial percentage rent generated by Casa D'Angelo was nothing more than a windfall to A & R. Likewise, no evidence showed that A & R relied upon the continued operation of the restaurant to enhance the operation of its surrounding property. The restaurant was not a magnet tenant in an integrated shopping center; it did not draw customers to A & R's other tenant nor did it encourage other tenants to lease the property. Thus, the provision for a percentage rent was not a substantial consideration of the lease agreement.¹⁴⁷ The court of appeals reversed the trial court and entered summary judgment in favor of Casa D'Angelo.¹⁴⁸

142. *Casa D'Angelo, Inc.*, 553 N.E.2d at 521 (quoting *Mercury Investment Co.*, 706 F.2d at 530).

143. *Id.*

144. *Id.* The court remarked that the current trend is to define substantial rent as a fair rental value. *Id.*

145. *Id.* The cited cases involved magnet tenants in shopping centers, economic interdependence between lessor's and lessee's business operations, and cases in which the base rent was determined in part on past performance of business operation. *Id.*

146. *Id.* at 522.

147. *Id.*

148. *Id.*

B. Landlord's Liability for Personal Injuries Caused by Defective Conditions on Leased Premises

Traditionally, the landlord has not been held liable for personal injuries caused by defective conditions on the leased premises.¹⁴⁹ Although the landlord's tort immunity is still generally recognized in Indiana, a number of exceptions have developed over the years. Indiana decisions have held the landlord liable for personal injuries resulting from defective conditions on the leased premises when (1) the condition is a latent defect known to the landlord but unknown to the tenant, and the landlord has failed to disclose the condition to the tenant;¹⁵⁰ (2) the premises are leased for admission of the public;¹⁵¹ (3) there is an express covenant to repair and the landlord either fails to repair or does so in a negligent manner;¹⁵² (4) the landlord voluntarily makes repairs and does so in a negligent manner;¹⁵³ (5) the defective condition is in an area under the control of the landlord and used in common by the tenants;¹⁵⁴ or (6) there is an unexcused or unjustified violation of a duty prescribed by an applicable statute or ordinance.¹⁵⁵ Two decisions decided during the survey period raised two of the exceptions to the landlord's general tort immunity.

149. See generally R. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* § 4:1, at 186-87 (1980); Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 101-02 (1982).

150. See, e.g., *Eggers v. Wright*, 143 Ind. App. 275, 240 N.E.2d 79 (1968); *Guenther v. Jackson*, 79 Ind. App. 127, 137 N.E. 528 (1922).

151. See, e.g., *Chrysler Corp. v. M. Present Co.*, 491 F.2d 320, 323 (7th Cir. 1974) (when property is leased for a "public purpose," lessor is under duty to use reasonable care to inspect and repair the premises before transferring possession); *Walker v. Ellis*, 126 Ind. App. 353, 129 N.E.2d 65 (1955) (lessor liable when he leases premises known to be unfit and dangerous for a public purpose).

152. See, e.g., *Childress v. Bowser*, 546 N.E.2d 1221, 1222-23 (Ind. 1989) (lessor liable for negligence in failing to make repairs as promised); *Hunter v. Cook*, 149 Ind. App. 657, 662, 274 N.E.2d 550, 552 (1971); *Stover v. Fechtman*, 140 Ind. App. 62, 64-65, 222 N.E.2d 281, 283 (1966); *Robertson Music House, Inc. v. Wm H. Armstrong Co.*, 90 Ind. App. 413, 416-18, 63 N.E. 839, 840 (1928).

153. See, e.g., *Hunter v. Cook*, 149 Ind. App. 657, 274 N.E.2d 550 (1971); *Robertson Music House v. Wm H. Armstrong Co.*, 90 Ind. App. 413, 63 N.E. 839 (1928).

154. See, e.g., *Flott v. Cates*, 528 N.E.2d 847, 848 (Ind. Ct. App. 1988); *Slusher v. State*, 437 N.E.2d 97, 99 (Ind. Ct. App. 1982); *Coleman v. DeMoss*, 144 Ind. App. 408, 416, 246 N.E.2d 483, 489 (1969). Arguably, this is not really an exception to the landlord's general immunity from liability for injuries caused by conditions on the leased premises, because the common areas are still under the control of the landlord and are not part of the demised premises occupied by the tenant.

155. See, e.g., *Hodge v. Nor-Cen, Inc.*, 527 N.E.2d 1157, 1160 (Ind. Ct. App. 1988); *Zimmerman v. Moore*, 441 N.E.2d 690, 696 (Ind. Ct. App. 1982); *Rimco Realty & Invest. Corp v. La Vigne*, 114 Ind. App. 211, 218-19, 50 N.E.2d 953, 956 (1943).

1. *Common areas.*—In *Frost v. Phenix*,¹⁵⁶ Bruce and Susan Phenix orally leased an apartment under a month-to-month agreement from the Frosts. The apartment was on the upper floor of a house that had been divided into three units. At the front of the house was a large porch that extended around the sides of the house. Two sets of concrete steps led to the porch, one on the south side and the main set of steps on the west side. The tenants had to cross the porch to reach the entryway leading to their apartments. After ascending the west steps leading to the porch, Susan stepped on the wood floor and the porch collapsed, throwing her forward and injuring to her elbow and leg.¹⁵⁷

The Phenixes knew that a portion of the cement steps had crumbled, that the wood floor creaked in places, and that there was a small hole in the floor to the left of where Susan fell. Several weeks before the injury, Bruce had stepped through a portion of the porch without injury. The Phenixes did not consider the porch hazardous. Rather, they considered the portion of the porch where Susan fell to be strong because it was just above the concrete steps and there were no signs of rotting or decayed wood in that area. At the time of the injury, a carpenter hired by the Frosts was repairing damage to the concrete steps and the wooden floor of the porch on the south side of the house, which had been caused by standing water from a leaky deteriorated gutter.¹⁵⁸

The Phenixes sued the Frosts for Susan's injuries. After granting the Frosts' motion for summary judgment, the trial court granted the Phenixes' motion to correct errors, and the Frosts appealed. The Frosts raised the following three issues on appeal: (1) did the Frosts owe any duty to the Phenixes; (2) was there a material question of fact regarding whether the Frosts had breached a duty of care; and (3) was there a material issue of fact as to whether Susan Phenix was contributorily negligent.¹⁵⁹

In addressing the first issue of duty, the court observed:

[C]aselaw supports Frosts' theory that a landlord is not liable where he is without knowledge of a latent defect, and is not liable for a tenant's personal injuries stemming from defective premises unless he expressly agrees to repair and is negligent in doing so.¹⁶⁰

156. 539 N.E.2d 45 (Ind. Ct. App. 1989).

157. *Id.* at 46.

158. *Id.* at 46-47.

159. *Id.* at 47.

160. *Id.*

However, the court stated that this general immunity applies only when the tenant leases the entire premises, such as a single family dwelling, and the injury occurs on the demised premises.¹⁶¹ Because Susan's injury occurred in a common area, a different rule applied. A landlord has a duty to use reasonable care to inspect and repair common areas, such as the porch used by all the tenants to reach their apartments, for the protection of the lessees.¹⁶² The Frosts had a duty to maintain the porch in a reasonably fit and safe condition for the benefit of the Phenixes.¹⁶³ The court concluded that the testimony of the Phenixes and the Frosts raised a material factual issue as to whether the Frosts breached their duty of care.¹⁶⁴

The Frosts had observed the decay on the south side of the porch at the time they purchased the house and had hired the carpenter to repair it. William Frost had visited the property about a week before the Phenixes moved in but denied seeing any holes or other damage in the wooden floor. Thus, a material question of fact existed which precluded the granting of the summary judgment.¹⁶⁵

The Frosts also argued that Susan's knowledge of the weak areas of the porch was equal or superior to their own and thus she was contributorily negligent as a matter of law. Some earlier cases held that equal or superior knowledge of a dangerous condition constituted contributory negligence as a matter of law. However, the court concluded that in this case a jury could reasonably find that although Susan knew of weaknesses elsewhere on the porch, she was not aware of the weakness in the area where she fell.¹⁶⁶ In addition, the court noted that "a reasonable jury could find that Susan did not fail to exercise reasonable care for her own safety under the circumstances *because she had to transverse the porch in order to enter her apartment.*"¹⁶⁷

Although the court did not elaborate on this observation, two of the cases cited by the court concerning the duty of a landlord with respect to common areas, *Coleman v. DeMoss*¹⁶⁸ and *Rossow v. Jones*,¹⁶⁹

161. *Id.*

162. *Id.* (citing W. PROSSER & W. KEETON, THE LAW ON TORTS § 63, at 441-442 (5th ed. 1984)).

163. *Id.* at 48.

164. *Id.*

165. *Id.* This obligation, however, is one of reasonable care only, and the landlord will not be liable for conditions not discoverable by reasonable inspection. W. PROSSER AND W. KEETON, THE LAW ON TORTS § 63, at 442 (5th ed. 1984).

166. *Frost*, 539 N.E.2d at 48.

167. *Id.* at 49 (emphasis added).

168. 144 Ind. App. 408, 246 N.E.2d 483 (1969).

169. 404 N.E.2d 12 (Ind. Ct. App. 1980).

indicate that the landlord has a duty to provide the tenant with a safe means to and from the leased premises. If the landlord fails to do so, the tenant would not be required to abandon the premises in order to avoid the defense of contributory negligence. Otherwise, the landlord would be permitted to constructively evict the tenant by breaching his duty to provide a safe means of ingress and egress.

2. *Violation of Statute or Ordinance.*—In *Dawson v. Long*,¹⁷⁰ Almedia McLayea took her one-month old nephew, Garfield Dawson, to visit a friend, Marvin Tardy, who rented a second story duplex apartment in a building owned by William Long. Tardy leased the apartment on a month-to-month basis with no agreement regarding repairs. During the first months of the lease, Tardy informed Long that there was no handrail along the stairway and that the wooden stairs were slippery and needed rubber or other nonslip material on them. However, Long took no action to correct these conditions until after the injury to Dawson had occurred.¹⁷¹

As McLayea left the apartment, carrying her nephew in an infant seat, she slipped and fell down a stairway. The stairway was not a common area but was part of the premises leased to Tardy.¹⁷² Because there was no handrail along the stairway, McLayea could not break her fall. Her shoulder struck a window on the landing, breaking the window and its screen. The infant fell through the opening to the ground below, suffering severe and permanent injuries, including brain damage. The window was unprotected by a guard rail. Tanya Dawson, the infant's mother, brought suit against Long claiming negligence and breach of an implied warranty of habitability.¹⁷³ After a hearing, the trial court granted Long's motion for summary judgement and Dawson appealed.¹⁷⁴

Dawson claimed that Long had violated several provisions of the Marion County Health Code,¹⁷⁵ and introduced into evidence copies of notices sent to Long by the Marion County Health Department indicating violations of the Health Code, including one pertaining to Tardy's dwelling.¹⁷⁶ The court noted that a non-excused or non-justified

170. 546 N.E.2d 1265 (Ind. Ct. App. 1989).

171. *Id.* at 1266. Long denied that any complaints had been made by Tardy before the date of Dawson's injury. *Id.* at 1267.

172. *Id.* at 1266.

173. *Id.* at 1265-66.

174. *Id.* at 1266.

175. MARION COUNTY, IND., THE HEALTH AND HOSPITAL CORP. GEN. ORDINANCE NO. 2-1980, ch. 10, art 1, § 10-102 (1982).

176. *Dawson*, 546 N.E.2d at 1266-68.

violation of a duty imposed by statute or ordinance is negligence per se,¹⁷⁷ but that

[i]n order for the violation of a statute or ordinance to be held as negligence per se, a trier of fact must determine whether the statute is applicable. It must decide whether the statute was designed to protect the class of persons in which the plaintiff is included against the risk of the type of harm which has occurred as a result of its violation.¹⁷⁸

The court then observed that the Health Code officially announced that it was enacted "to protect, preserve and promote the physical and mental health and social well-being of the people" and to "insure that the quality of housing is adequate for protection of public health, safety and general welfare."¹⁷⁹ Thus, the plaintiff Dawson was clearly within the class of persons intended to be protected by the ordinance.¹⁸⁰

Having determined that the Health Code applied, the court next addressed the question of whether the Code was violated and whether the violation was the proximate cause of the plaintiff's injury.¹⁸¹ The Health Code specifically imposed duties to provide handrails on any steps containing at least four risers, to install uniform risers and treads on all inside or outside stairs or steps, and to maintain windows in sound condition and good repair.¹⁸² The undisputed evidence demonstrated that there was no handrail along the top four stairs leading to Tardy's apartment; there were no treads on the wood stairs; the window was loose; the screen outside the window was rotten; and there was no guard rail in front of the large window on the landing. Sufficient evidence existed from which a fact finder could conclude that Long had violated one or more provisions of the Health Code and that these violations were the proximate cause of the injury. Therefore, the court reversed the trial court's grant of the motion for summary judgment on the issue of Long's negligence.¹⁸³

177. *Id.* at 1266-67 (citing *Ray v. Goldsmith*, 400 N.E.2d 176 (Ind. Ct. App. 1980)). See also *Hodge v. Nor-Cen, Inc.*, 527 N.E.2d 1157 (Ind. Ct. App. 1988).

178. *Dawson*, 546 N.E.2d at 1268 (citing *Ray v. Goldsmith*, 400 N.E.2d 176 (Ind. Ct. App. 1980); and W. PROSSER & W. KEETON, *THE LAW ON TORTS* § 36, at 229-30 (5th ed. 1984)).

179. *Id.* (citing MARION COUNTY, IND., *THE HEALTH AND HOSPITAL CORP. GEN. ORDINANCE* No. 2-1980, ch. 10, art 1, § 10-102).

180. *Id.* at 1269.

181. *Id.* For a fact finder to determine there was negligence per se, there must be evidence that there was a violation of the statute or ordinance, and that the violation proximately caused the injury complained of. *Id.* at 1268.

182. *Id.* (citing MARION COUNTY, IND., *THE HEALTH AND HOSPITAL CORP. GEN. ORDINANCE* No. 2-1980, ch. 10, art 1, § 10-301).

183. *Dawson*, 546 N.E.2d at 1269.

Finally, Dawson alleged that a material issue of fact existed regarding Long's liability under breach of an implied warranty of habitability.¹⁸⁴ Although Indiana has recognized an action by tenants for economic damages resulting from breach of the implied warranty, Indiana courts have never allowed recovery for personal injuries to tenants or their guests. Dawson cited *Zimmerman v. Moore*¹⁸⁵ for the proposition that a tenant may recover for personal injuries under an implied warranty of habitability theory.¹⁸⁶ The court, however, distinguished *Zimmerman*, which denied recovery to the tenant under a warranty of habitability theory because *Zimmerman* was not a professional landlord. Here, Dawson attempted to extend the landlord's duty to the tenant under an implied warranty to an injured guest. The court refused to extend the landlord's duty under the warranty beyond the tenant.¹⁸⁷

C. Warehouseman's Liens on Tenant's Property Placed in Storage Following Eviction

In *Moore v. Republic Moving and Storage, Inc.*,¹⁸⁸ the landlord, Braeburn Apartments, obtained a default judgment for \$457 plus court costs in a Marion County small claims court against Ronald Moore and Rita Green because they failed to make rental payments.¹⁸⁹ The court issued a writ of restitution and order of eviction, and on December 10, 1985, the constable removed the tenants' property from their apartment and placed it in storage at Republic Moving and Storage, Inc. (Republic). The writ of restitution advised the tenants that their property would be removed, placed in storage, and levied upon for the judgment, plus costs and interests.¹⁹⁰

On March 27, 1986, Republic published a notice in the *Indianapolis Commercial* newspaper claiming that Moore and Green were liable for \$580 to satisfy a warehouseman's lien and that an auction would take place in Indianapolis after April 10, 1986. In July 1986, Moore and Green filed a complaint against Republic seeking the return of their property or damages if the property had been sold. In September 1986, Republic filed a motion to dismiss. Republic sold the property, valued at \$2000, at a public auction in November 1986 to satisfy their handling,

184. *Id.*

185. 441 N.E.2d 690 (Ind. Ct. App. 1982).

186. *Dawson*, 546 N.E.2d at 1269.

187. *Id.* at 1269-70.

188. 548 N.E.2d 1211 (Ind. Ct. App. 1990).

189. *Id.* at 1212.

190. *Id.*

storage, and newspaper advertising charges totaling \$980. The tenants did not receive notice of the sale nor did the company make a specific demand on them for payment. Republic's motion to dismiss was granted in February 1987.¹⁹¹

Indiana law provides that "a warehouseman has a lien against the bailor on goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation" ¹⁹² Furthermore, a warehouseman's lien is effective only "against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid." ¹⁹³ Thus, a lien is created against the owner only if he acts as a bailor or authorizes another to act as a bailor. Therefore, the tenants argued that Republic did not possess a valid warehouseman's lien because a small claims court constable is not a bailor and because they did not authorize or consent to the storage of their property with Republic. ¹⁹⁴

The court was unable to find any Indiana authority directly on point, but decisions from other jurisdictions held that a warehouseman does not have a lien on property turned over to it by a constable who had removed property pursuant to an order of restitution. ¹⁹⁵ Although the court concluded that Republic did not have a valid lien, it recognized Republic's right to terminate the storage when the agreed storage period ended or, if no period was fixed, within a stated period not less than thirty days after notification to interested parties. ¹⁹⁶ Also, unless the goods have been removed by the owner before the end of the stated period, the warehouseman could sell the goods under the provisions of Indiana law. ¹⁹⁷ However, the court found the sale of the tenants'

191. *Id.*

192. IND. CODE § 26-1-7-209(1) (1988), *cited in Moore*, 548 N.E.2d at 1212.

193. *Moore*, 548 N.E.2d at 1212.

194. *Id.* at 1213.

195. *Id.*

196. *Id.* at 1214-15. *See also* IND. CODE § 26-1-7-206 (1988), which provides:

A warehouseman may, on notifying the person on whose account the goods are held and any other person known to claim an interest in the goods require payment of any charges and removal of the goods from the warehouse at the termination of the period . . . , or, if no period is fixed, within a stated period not less than thirty (30) days after the notification. If the goods are not removed before the date specified in the notification, the warehouseman may sell them in accordance with the provisions of the section on enforcement of a warehouseman's lien.

Id.

197. *See* IND. CODE § 26-1-7-210 (1988), which requires that notification be given to all persons known to claim an interest in the goods and that the notification include a description of the goods, a statement of the amount due, a demand for payment, the nature of the proposed sale, and the time and place of any public sale.

property was improper because the notice of sale did not comply with the provisions of Indiana Code section 26-1-7-210.¹⁹⁸

The court also rejected Republic's claim that a lien arose by operation of law and that a warehouseman's lien was not necessary to sell the tenants' property to satisfy the storage fees.¹⁹⁹ Republic argued that it had acquired a lien under Indiana Code section 32-7-3-6 which provides:

The justice shall issue a writ, directed to some constable of the county, commanding him to deliver said premises to said plaintiff, by removing the defendant and his goods therefrom, or otherwise, so that the plaintiff has complete possession thereof, and also to levy such damages and costs, of the goods of said defendant as might be done by virtue of a writ of fieri facias.²⁰⁰

The court observed that the statute was clearly designed for the benefit of the party awarded the judgment, the landlord.²⁰¹ Republic was not a party to the action nor had it established that it was acting as an agent for the landlord. Rather, Republic was acting solely on its own behalf. In addition, the statute indicates that the sheriff, not the landlord, is to levy upon the goods and chattels of the judgment debtor.²⁰² Because Republic did not have a warehouseman's lien, the court determined that the sale of tenant's property was improper and that their complaint should not have been dismissed.²⁰³

Several interesting issues were only indirectly addressed by the court because Republic never sought payment of the storage or transportation charges from Moore and Green. Had Moore or Green attempted to remove their goods from storage could they have done so without payment of the storage fees? One of the cases the court cited with apparent approval, *Young v. Warehouse No. 2, Inc.*,²⁰⁴ held that when

198. *Moore*, 548 N.E.2d at 1215. The published notice did not contain the exact date of the sale nor did it provide Moore or Green with notice of the date or time of the sale. In addition, Republic did not make a specific demand for payment. *Id.*

199. *Id.* at 1215-16.

200. *Id.* at 1215. All of chapter 3 of title 32, article 7 of the Indiana Code was repealed by the Indiana Legislature in 1990. This chapter included not only the provision for the issuance of a writ of restitution, but also Indiana's forcible detainer and unlawful entry statute. IND. CODE § 32-7-3-12 (1988). The legislature did not enact any laws to replace the repealed chapter.

201. *Moore*, 548 N.E.2d at 1216.

202. *Id.* at 1215-16. See also *Schuler v. Langdon*, 433 N.E.2d 841, 845-46 (Ind. Ct. App. 1982) (Staton, J., dissenting). The sale of the judgment debtors' goods under a writ of execution is governed by IND. CODE §§ 34-1-36-1 to -12 and 34-1-37-1 to -12.

203. *Moore*, 548 N.E.2d at 1217.

204. 540 N.Y.S.2d 654 (1989).

a landlord delivers a tenant's goods to a warehouseman for storage, the tenant may recover possession of the goods from the warehouse at any time without payment of the storage fee.²⁰⁵ If the tenant does claim the goods within the thirty-day period, the goods may be sold under U.C.C. § 7-210. However, the warehouseman must hold the proceeds for the benefit of the tenant and must look to the landlord for payment of the storage charges.²⁰⁶

The court also appeared to question whether the owners of the goods were liable for the contract amount of the storage charges. The court suggested that Republic might have pursued an action against the owners in quantum meruit, obtained judgment, then executed upon the judgment.²⁰⁷ This suggestion implies that the warehouseman could not withhold the goods from the owner, nor could he convert any of the proceeds from the sale of the goods for payment of the storage charges.

VI. OCCUPYING CLAIMANT STATUTE

In 1970, the City of Gary purchased property for \$30,000 but failed to record the deed in the Lake County Recorder's office. Three years later, the city constructed Fire Station 7 on the property at a cost of \$300,000. Because the deed was not recorded, the county continued to bill the former owner for the taxes on the land. Feeling no obligation to continue paying taxes on the property, the former owner allowed the assessed taxes to become delinquent and the property was sold at a tax sale in 1984 for \$2,272. The purchasers, Joseph and Bernice Belovich, obtained a tax deed and brought an action to evict the City from the property, now estimated to be worth \$600,000.²⁰⁸ In a prior appeal, the court had determined that the Beloviches had acquired title to the property as a result of the tax deed.²⁰⁹ After remand, the city recorded its deed and continued to use the property as a fire station.

In *City of Gary v. Belovich*,²¹⁰ the court concluded that the city's continued use of the property as a fire station constituted inverse condemnation and issued an order appointing appraisers.²¹¹ The court dismissed the City's counterclaim that it was entitled to the value of

205. *Id.* at 655-56.

206. *Id.*

207. *Moore*, 548 N.E.2d at 1217 n.6.

208. *Dirt Cheap: Fire Station Bought for \$2,272, Thanks to Blunder*, Indianapolis Star, Aug. 28, 1986, at A2.

209. *City of Gary v. Belovich*, 504 N.E.2d 286 (Ind. Ct. App. 1987).

210. 544 N.E.2d 178 (Ind. Ct. App. 1989).

211. *Id.* at 178-79.

the improvements made to the property under the Occupying Claimant Statute.²¹²

On appeal, the court of appeals affirmed the trial court's granting of summary judgment on the issue of inverse condemnation and the trial court's dismissal of the city's counterclaim.²¹³ The court concluded that the Occupying Claimant Statute was designed to afford relief to an occupant who made improvements on the land in good faith and under color of title. The Statute was never intended to apply when the true owner makes improvements to his property and then loses his title through operation of law.²¹⁴ When the city lost its title to the Beloviches as the result of the tax sale, the city lost title to both the real estate and the improvements.²¹⁵

VII. RECORDING ACT: THE CHAIN OF TITLE

During the last survey period, the court of appeals extended the search of the public records required to determine the title to real estate. The court held that a purchaser has constructive notice of interests recorded outside the chain of title.²¹⁶ In *Szakaly v. Smith*,²¹⁷ Sherrill and Isabelle Arvin, owners of a 195-acre tract of land, conveyed a 190-acre portion of the tract in 1956 to the Ransburgs, the Szakalys' predecessor in title. The deed, which was not recorded until 1965, granted a right-of-way easement over the five-acre tract retained by the Arvins. In 1957, the Arvins conveyed the five-acre tract to a trustee who, on the same day, reconveyed the land to Isabelle Arvin alone. Both deeds were promptly recorded and neither deed referred to the easement granted in the 1956 deed. In 1979, the five-acre tract was conveyed to Ronald Smith. Ronald and Linda Smith are the current

212. *Id.* at 178 (citing IND. CODE § 34-1-49-1) (1988)).

213. *Id.* at 178-79.

214. *Id.* at 179. A similar claim was made in *Kolley v. Harris*, 553 N.E.2d 164 (Ind. Ct. App. 1990). The Harrises defaulted on a conditional sales contract after making substantial improvements to the property. In an action for damages by the vendors, the Harrises counterclaimed for the value of improvements made to the property under the Occupying Claimant Act. On an appeal by the vendors from a summary judgment awarding the Harrises \$16,040 on their counterclaim, the court concluded that the Occupying Claimant Act was intended to protect an occupant "found not to be the rightful owner" who had made improvements to the land of another in good faith and under color of title. *Id.* The act was not intended to compensate an equitable owner who made improvements to the land under a contract for sale and who subsequently loses the land by failure to perform the terms of the contract. *Id.*

215. *Belovich*, 544 N.E.2d at 179.

216. *Szakaly v. Smith*, 525 N.E.2d 343, 346 (Ind. Ct. App. 1988), *superceded by* *Szakaly v. Smith*, 544 N.E.2d 490 (Ind. 1989).

217. *Id.*

owners of the five-acre tract. The Szakalys, the owners of the 190-acre tract, claimed a right of way easement across the Smiths' property.²¹⁸

The single issue raised was whether the recording of the 1956 deed in 1965 operated as record notice of the easement at the time Ronald Smith purchased the property in 1979, and thus prevented him from taking the title free and clear of the easement as a bona fide purchaser in good faith and for value.²¹⁹ The Smiths argued that once the deed from the Arvins to the trustee and the deed back to Isabelle Arvin were recorded, the easement was outside the chain of title.²²⁰ To understand this argument, it is necessary to first briefly explain the chain of title concept.

In most states, the public records affecting title to real property are indexed under the names of the parties involved. This name index is commonly referred to as the grantor-grantee index system.²²¹ In examining the title to property, the title searcher begins with the present owner in the grantee index and works backward until he finds a conveyance to the present owner from his grantor. He then searches under the name of his grantor in the grantee index until he finds a conveyance to him, and so on, until he traces the title back to a patent from the state or federal government. The title searcher then turns to the grantor index and begins his search forward, starting with the name of the party who acquired title from the state or federal government. He continues to search under the name of this party from the date he acquired title until he finds a recorded deed out from that party conveying the land in question to another. He then stops his search under the name of the former owner and continues the search under the name of the new owner (the grantee in the deed out) from the date he acquired title until a deed out from him is recorded. He continues the search under the new owner. A title searcher would have no reason to continue his search under the name of the former owner once his deed out is recorded. This search in the grantor index is continued to the present time. The documents discovered by this method of searching the public records are referred to as "the chain of title."²²²

218. *Id.* at 344.

219. *Id.*

220. *Id.* at 344-45.

221. The term "grantor-grantee" index system is a misnomer. Although the index to the deed books is alphabetized under the names of grantors and grantees, the indexes to other records such as the *lis pendens* notice, probate docket, judgment docket, and mortgage books, while containing the name of the persons involved are not truly grantor-grantee indexes. Because these transactions may affect title to the property, they must also be examined by the title searcher under the name of each owner during the ownership period.

222. For a more detailed discussion of the chain of title concept, see generally R. CUNNINGHAM, W. STOEBOCK & D. WHITEMAN, *THE LAW OF PROPERTY* § 11, at 796-802 (1984); and Cross, *The Record "Chain of Title" Hypocrisy*, 57 *COL. L. REV.* 787 (1957).

The court of appeals rejected the Smiths' argument that once the 1957 conveyance from the Arvins to the trustee for reconveyance was recorded, the easement was outside the chain of title.²²³ Instead, the court concluded that a subsequent purchaser is charged with notice of an interest contained in any instrument from a common grantor even if the instrument is recorded after the recording of the deed out from the common grantor.²²⁴

Thus, the court, relying heavily on *Hazlett v. Sinclair*,²²⁵ held that Indiana "recognizes an exception to the rule that the record of a conveyance out of the line of title does not give constructive notice of its contents to innocent purchasers for value without notice."²²⁶ The court reached this holding by reading *Hazlett* as "charging grantees of servient tenements with knowledge of all the information supplied by the recorded conveyances of the common grantor."²²⁷

However, as was suggested in last year's survey, the court may have read too much into the *Hazlett* decision.²²⁸ In fact, the *Hazlett* court may have been addressing an entirely different issue. In some states, the title searcher examining the instruments within the chain of title is not required to examine deeds out from the common grantor involving other tracts of land that were recorded during the time the common grantor held title to the land in question.²²⁹ In Indiana, the title searcher is required to examine *all* deeds out from the common grantor, even deeds to other tracts of land.²³⁰ These deeds would be discovered during the title search because they were recorded during the period of time the searcher is searching the title to the land under the name of the common grantor.

The Indiana rule is equitable because a deed to one tract of land often contains an easement or restrictive covenant burdening another tract of land owned by the common grantor. If the title searcher could safely ignore such instruments, the purchaser would not be protected unless he recorded the deed under the legal descriptions of all the lands burdened by the conveyance. It is far different, however, to require the title searcher to continue searching the record under the

223. *Szakaly*, 525 N.E.2d at 344.

224. *Id.* at 346.

225. 76 Ind. 488 (1881).

226. *Szakaly*, 525 N.E.2d at 346.

227. *Id.*

228. See Krieger, *Survey of Recent Developments in Indiana Property Law*, 23 IND. L. REV. 485, 509 (1989).

229. See 4 AMERICAN LAW OF PROPERTY § 17.24, at 602 (Casner ed. 1952).

230. E.g., *Hazlett v. Sinclair*, 76 Ind. 488, 493-494 (1881); *Howard D. Johnson Co. v. Parkside Dev. Corp.*, 169 Ind. App. 379, 385-86, 348 N.E.2d 656, 661 (1976).

name of the common grantor after the deed out to the land whose title is being searched has been recorded.

In *Hazlett*, it was unclear whether the grantor still owned the land when the deed conveying the other tract of land was recorded. If the grantor still owned the land, the recording of the instrument was within the chain of title and the decision was not as far reaching as the court of appeals concluded. By interpreting *Hazlett* so broadly, the court of appeals's opinion charges a subsequent purchaser with constructive notice of all claims and interests in a recorded deed from a common grantor regardless of when the instrument was recorded, provided it is recorded before the purchaser's deed. This holding would require the title searcher to continue to search the records under the name of every grantor of the property in the grantor-grantee index from the date the grantor acquired the title to the present.²³¹ Such a task would greatly increase the time and expense of a title search.²³²

During this survey period, the Indiana Supreme Court granted transfer of *Szakely*.²³³ The supreme court agreed with the court of appeals that the subsequent purchasers in this case had notice of the easement across their property.²³⁴ However, in a well-reasoned opinion by Justice Dickson, the court narrowly restricted the rationale of the lower court decision. The court observed that there was no need for the court of appeals to discuss the effect of a late recording outside the chain of title because the recording was in fact within the chain of title.²³⁵ When the deed to the dominant estate was recorded in 1965, Isabelle Arvin, Smith's predecessor in title, was still the record owner of the servient estate.²³⁶ A title searcher examining Smith's chain of title during the 1965 period would have searched the grantor-grantee index under the name of Isabelle Arvin and would have found the recorded deed from Sherrill and Isabelle Arvin to the Ransburgs. An examination of this deed would have revealed the existence of the easement across the property being purchased by Smith.

Although finding the recording in this case was within the chain of title, the court chose "to discuss and clarify the extent to which belatedly recorded conveyances of a common grantor provide construc-

231. Some courts do require such an extended search of the record. See, e.g., *Woods v. Garnett*, 72 Miss 78, 16 So. 390 (1894).

232. See J. CRIBBET AND C. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 321-22 (3d ed. 1989) [hereinafter CRIBBET].

233. *Szakaly v. Smith*, 544 N.E.2d 490 (Ind. 1989).

234. *Id.* at 492.

235. *Id.*

236. *Id.* This fact was not revealed in the court of appeals opinion, making it impossible to determine whether or not the recording was within the chain of title.

tive knowledge to subsequent grantees."²³⁷ In examining *Hazlett*, the court observed that the decision did not disclose the dates of recording of the deeds, and thus it was impossible to determine whether the deed creating the easement was recorded within the subsequent purchaser's chain of title. After examining several Indiana decisions, the court concluded that the recording of an instrument outside the chain of title does not provide notice to a bona fide purchaser for value.²³⁸ Because in this case, however, the easement was recorded within the chain of title, the court held that the Smiths had constructive notice of the encumbrance and reversed the trial court's judgment.²³⁹

VIII. WARRANTY OF HABITABILITY IN SALE OF HOME

A. Background

Until the 1960s, the law governing the purchase of a new home was *caveat emptor*.²⁴⁰ Today, the overwhelming majority of jurisdictions imposes an implied warranty of habitability on the builder-vendor in the sale of a new home.²⁴¹ In 1972, the Indiana Supreme Court first recognized an implied warranty of habitability in the sale of a new home by the builder vendor.²⁴² In 1976, the court extended the builder-vendor's implied warranty to a second or subsequent purchaser of the home, allowing the subsequent purchaser to bring an action against the original builder-vendor for latent defects in the design or construction of the house.²⁴³

237. *Id.* at 491.

238. *Id.* at 492. The court stated:

Hazlett does not establish that a grantor is charged with constructive knowledge of conveyances from a remote grantor that are outside of his chain of title. In light of *Rogers v. Evansville*, 437 N.E.2d 1019 (Ind. Ct. App. 1982) and *Residents of Green Springs Valley Subdivision v. Town of Newburgh*, 168 Ind. App. 621, 344 N.E.2d 312 (1976) I view the language in *Hazlett* as limited by the chain of title requirement.

Id.

239. *Id.*

240. See generally CRIBBET, *supra* note 232, at 282. For a discussion of the rationale and the historical development of the implied warranty of habitability in the sale of a new home by a builder-vendor, see generally Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835 (1967).

241. See generally Shedd, *The Implied Warranty of Habitability: New Implications, New Applications*, 8 REAL EST. L.J. 291, 302 (1980). By 1980, 36 states and the District of Columbia had recognized implied warranty of habitability in the sale of a new home by a builder-vendor. See *id.* at 303-06. See also Conklin v. Hurley, 428 So. 2d 654, 656 n.2 (Fla. 1983) (citing 33 decisions recognizing the implied warranty of habitability).

242. *Theis v. Heuer*, 264 Ind. 1, 12, 280 N.E.2d 300, 306 (1972).

243. *Barnes v. Mac Brown and Co.*, 264 Ind. 227, 230, 342 N.E.2d 619, 621 (1976).

Later, however, the Indiana Court of Appeals refused to recognize an implied warranty of habitability in the sale of a used home by a non-builder vendor.²⁴⁴ The purchaser's sole remedy against his immediate seller would be under the tort theories of misrepresentation or fraudulent concealment.²⁴⁵ Indiana does not currently view the mere failure to disclose hidden defects known to the seller and unknown to the buyer as fraudulent concealment.²⁴⁶

In 1986, the Indiana legislature enacted a statute establishing express statutory warranties that a builder may provide to the initial purchaser of a new home.²⁴⁷ Upon providing these warranties to the initial buyer, the builder-vendor may disclaim any implied warranties. However, the statute requires that certain conditions be met before the builder can disclaim the implied warranties: (1) the performance of the warranty obligations must be backed by an insurance policy at least equal to the purchase price; (2) the builder must carry completed operations product liability insurance to cover any reasonably foreseeable consequential damages arising from a defect covered by the warranties; (3) the disclaimer of any implied warranties must be printed in a minimum size of ten-point and in bold face type; and (4) the buyer must acknowledge the disclaimer of any implied warranties by signing a separate one-page notice containing specific statutory language at the time of the contract's execution.²⁴⁸

During this survey period, there were four decisions touching upon one or more aspects of the implied warranty of habitability. These decisions continue to define the scope of the implied warranty in Indiana.

B. Statute of Limitations

In *Lechner v. Reutepohler*,²⁴⁹ the Reutepohlers purchased a new home from the Lechners in November 1981. While moving into the house, the Reutepohlers noticed small cracks in a basement wall. They also noticed that small puddles of water appeared on the basement floor after every rain.²⁵⁰ The Reutepohlers observed that the slope of the yard away from the house failed to prevent puddles from forming in front of the house. The Reutepohlers attempted to increase the

244. *Vetor v. Shockey*, 414 N.E.2d 575, 577 (Ind. Ct. App. 1980).

245. *Id.* at 577; *Lyons v. McDonald*, 501 N.E.2d 1079, 1081 (Ind. Ct. App. 1986).

246. *Indiana Bank & Trust Co. v. Perry*, 467 N.E.2d 428 (Ind. Ct. App. 1984).

247. IND. CODE § 34-4-20.5-1 (1988).

248. *Id.* § 34-4-20.5-9.

249. 545 N.E.2d 1144 (Ind. Ct. App. 1989).

250. *Id.* at 1145-46.

slope, but water continued to run against the house and the basement continued to flood. In April 1985, the Reutepohlers called Gene Giehl of G & S Homes, who advised them that the cracks in the wall needed repair.²⁵¹ G & S Homes attempted to correct the water problem in April 1985 but additional repairs were required, and the work was not completed until July 1986. In 1987, the Reutepohlers contacted Lechner and requested that he pay for the repairs. When he refused, the Reutepohlers filed suit in small claims court for breach of an implied warranty of habitability.²⁵² The trial court awarded the Reutepohlers \$3,000 (the jurisdictional limit) plus costs, and the Lechners appealed.²⁵³

Two issues were raised on appeal: (1) was the action barred by the statute of limitations; and (2) was the action barred by the release provision contained in the purchase agreement.²⁵⁴ Regarding the first issue, the court observed that the Lechners were not required to plead the statute of limitations as an affirmative defense because the action was filed in a small claims court.²⁵⁵ Nevertheless, the party claiming the statute of limitations as an affirmative defense must litigate the issue at trial, and the Lechners did not raise the statute of limitations.²⁵⁶ Although the issue had been waived, the court nevertheless stated that the statute of limitations for breach of the implied warranty of habitability was six years.²⁵⁷

The Reutepohlers had argued that Indiana Code section 34-4-20-2 should apply. This provision states that an action to recover damages to property arising out of a deficiency in the construction of an improvement to real property must be brought within ten years of the completion of the improvement.²⁵⁸ The court rejected this argument holding that this statute was a statute of repose, not a statute of limitations.²⁵⁹ Read together with Indiana Code section 34-1-2-1, which

251. *Id.*

252. *Id.* at 1146. The court appeared to have presumed Lechner's status as a builder-vendor. The facts indicate that Virgil Lechner provided the blueprints and hired subcontractors to do the actual construction. *Id.* at 1145. Furthermore, because he sold 12 other houses using a similar method it appears that he was in the business of selling houses to the general public. Perhaps the court did not find it necessary to discuss this point. The court subsequently found Lechner not liable for breach of an implied warranty of habitability because of the release clause in the purchase agreement. *Id.* at 1147-48.

253. *Id.* at 1146.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 1147 n.1 (citing IND. CODE § 34-1-2-1 (1988)).

258. *Id.* The cited statute also provides that an action may be brought within 12 years after the completion and submission of plans and specifications to the owner if the action is for design deficiency. IND. CODE § 34-4-20-2 (1988).

259. *Lechner*, 545 N.E.2d at 1147 n.1.

requires that an action for injury to property other than personal property be commenced within six years after the cause of action has accrued, these statutes indicate that a party has six years to bring an action for breach of an implied warranty of habitability after the harm occurs. Thus, if the cause of action began when the Reutepohlers discovered the water problem in 1981, their suit in 1988 would have been barred by the six-year statute of limitations even though the statute of repose had not yet expired.²⁶⁰

C. *Waiver of the Implied Warranty of Habitability*

In *Lechner*, the Lechners listed the house for sale with Century 21 Realty while it was still under construction.²⁶¹ All negotiations and transactions connected with the sale were conducted through Century 21. The Lechners had sold twelve other homes using a similar method.²⁶² The purchase agreement contained a provision releasing the seller from all liability relating to any defect in the house.²⁶³

Although the Reutepohlers contended that the release provision failed for lack of adequate consideration, the court found that the mutual promises of the Reutepohlers to buy and the Lechners to sell the house for \$65,000 were adequate consideration to support the purchase agreement.²⁶⁴ The court likewise rejected the Reutepohlers' argument that the provision should be considered void as against public policy. The court stated that "no public policy prevents parties from agreeing in advance that one is under no obligation of care for the benefit of the other," even if the conduct would otherwise be negligent.²⁶⁵

However, the court, in a footnote, emphasized that the purchase of the house occurred in 1981, before the enactment of Indiana Code section 34-4-20.5-9. This section sets forth specific requirements that a builder-vendor must comply with before disclaiming the implied warranties of habitability in the sale of a new home.²⁶⁶

260. *Id.*

261. *Id.* at 1145.

262. *Id.*

263. *Id.* at 1148. The purchase agreement stated:

Inspection of the real estate and improvements thereon is hereby waived by Purchaser who is relying entirely for its condition upon Purchaser's own examination and Purchaser hereby releases the Seller, Broker, and their sales agents from any and all liability relating to any defect or deficiency affecting the real estate and improvements which release shall survive the closing of this transaction.

Id.

264. *Id.*

265. *Id.*

266. *Id.* at 1148 n.3.

An identical release provision was involved in *Callander v. Sheridan*.²⁶⁷ In *Callander*, the purchasers, the Sheridans, filed suit against the builder-vendor, Callander, alleging a breach of the implied warranty of habitability.²⁶⁸ The trial court awarded the Sheridans \$11,000 in damages.²⁶⁹

On appeal, Callander argued that the release clause in the purchase agreement barred any recovery against him. The court observed that the release clause was contained in a section of the purchase agreement entitled "Inspection" and that a box had been checked with a typed "X."²⁷⁰ Based upon the wording of the release clause and its location in the purchase agreement, the court concluded that the provision only applied to defects discoverable by a reasonable inspection of the premises.²⁷¹ The defects were not discoverable by a reasonable inspection; therefore, the release clause was inapplicable.²⁷² The court further noted that Callander was a "builder-vendor," not just a "seller" and the wording of the clause did not explicitly release a builder-vendor from liability.²⁷³

The effect of a release provision in a purchase agreement involving the sale of a used home by a non-builder vendor was raised in *Kaminszky v. Kukuch*.²⁷⁴ Kukuch, the owner of rental property, employed a professional contractor to install insulation in the house. Kukuch did not select the type of insulation nor did he inquire as to the type of insulation, but instead relied upon the contractor to use the best

267. 546 N.E.2d 850 (Ind. Ct. App. 1989).

268. *Id.*

269. *Id.* at 851.

270. *Id.* at 853.

271. *Id.* Decisions from other jurisdictions have also concluded that "as is" provisions only waive patent defects and do not apply to latent defects not discoverable by a reasonable inspection. *E.g.*, *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970) (such provisions should be construed against the seller).

272. *Callander*, 546 N.E.2d at 853. The defects were not visible at the time of the sale, and an expert witness testified that the problem resulted from a lack of footing below the frost line that could not be determined until after excavations.

273. *Id.* In a separate dissenting opinion, Chief Judge Ratliff observed that in *Lechner v. Reutepohler*, 545 N.E.2d 1144, 1148 (Ind. Ct. App. 1989), an identical provision was found to bar recovery against the builder-vendor for defects in the foundation of the house. The language in the release provision was clear and unambiguous and released the seller from all liability arising out of defects in the premises, even latent defects, and at the time the purchase agreement was entered into there was no public policy prohibiting such a release. *Callander*, 546 N.E.2d at 854 (Ratliff, C.J., dissenting). The language "at the time the purchase agreement was entered into" suggests that Judge Ratliff might not be certain such a clause would be effective today to release the builder-vendor because of the subsequent enactment of Indiana Code § 34-4-20.5-9, which now governs the disclaimer of the implied warranty of habitability by a builder-vender. *See* IND. CODE § 34-4-20.5-9 (1988).

274. 553 N.E.2d 868 (Ind. Ct. App. 1990).

insulation available. In 1985, the Kaminszkys purchased the house from Kukuch. They inspected the house three times before purchasing it, observing insulation similar to the type installed at a previous residence. The house obviously had been insulated because there were plugs visible on the outside of the house. After purchasing the house, Judith Kaminszky noticed a "different" taste in her mouth and began to experience skin irritation and dizziness. Subsequently, the Kaminszkys found a type of insulation different from the type they observed during the original inspection. It proved to be urea-formaldehyde foam insulation. The Kaminszkys subsequently filed suit for damages and rescission, alleging breach of an implied warranty of habitability, failure to disclose, and mutual mistake.²⁷⁵ After a bench trial, the court found for Kukuch.²⁷⁶

The Kaminszkys first argued that the formaldehyde insulation was a latent defect, which constituted a breach of the implied warranty of habitability. The court did not address this issue because it found that Kukuch was not a builder-vendor and that *Vetor v. Shockey*²⁷⁷ limited the implied warranty of habitability to builder-vendors.²⁷⁸

Second, the Kaminszkys argued that Kukuch was under a duty to disclose the existence of the formaldehyde insulation. In response to this argument, the court remarked that the trial court had found that the seller made no fraudulent statements or misrepresentations.²⁷⁹ In addition, the court noted that Kukuch had relied on the contractor to use the best insulation available and that he was unaware of the type of insulation installed.²⁸⁰

The court concluded that the inspection clause in the purchase agreement protected the seller from liability for latent defects.²⁸¹ The court distinguished *Callander v. Sheridan*,²⁸² which had held a similar inspection clause did not release a builder-vendor from liability on the grounds that Kukuch was only a seller and not a builder-vendor.²⁸³

275. *Id.* at 870. Because the Kaminszky's presented no argument on the issue of mistake, the court did not address this issue in the opinion. *See id.* at 870 n.1.

276. *Id.* at 869-70.

277. 414 N.E.2d 575, 577 (Ind. Ct. App. 1980).

278. *Kaminszky*, 553 N.E.2d at 870. The Kaminszkys claimed that Kukuch acted as a general contractor and should be held liable as a builder-vendor. The court, however, found that Kukuch did not act as a general contractor but instead hired a professional to install the insulation. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 871.

282. 546 N.E.2d 850 (Ind. Ct. App. 1980).

283. *Id.* at 853.

Although the court did not address the issue, it is unlikely that a seller would be protected against liability by a release provision when the sellers made an express misrepresentation.²⁸⁴

D. Who is a Builder-Vendor?

In *Callander v. Sheridan*,²⁸⁵ Ray Callander employed several subcontractors to build a house for his family. Callander subsequently sold the house to the Sheridans, who brought this action alleging defects in the foundation and construction of the home. The trial court awarded the Sheridans \$11,000 damages.²⁸⁶

Callander contended that he was exempt from an implied warranty of habitability because he was not in the business of building homes for resale and lacked the experience and training of those in the building trade.²⁸⁷ The court responded that Callander had obtained the plans for the house from a builder, and had modified them.²⁸⁸ Callander also obtained a building permit in his own name, hired subcontractors, purchased electrical equipment and lumber for the house, told a subcontractor where to put the basement and how deep it should be, instructed a subcontractor on where and when to backfill, and placed a motor home on the premises from which to observe the work being done in the evenings. Callander did most of the electrical wiring, stained the molding, laid the ceramic floor, and did the landscaping. In his brief, Callander admitted acting as his own general contractor.²⁸⁹ The court concluded that because he undertook to act as a general contractor, he must assume the responsibility and the liability of a builder-vendor to a subsequent buyer.²⁹⁰ Thus, the court refused to limit the implied warranty to builder-vendors in the business of building homes for resale to the general public.²⁹¹

284. See, e.g., *Indiana Bank & Trust Co. v. Perry*, 467 N.E.2d 428 (Ind. Ct. App. 1984).

285. 546 N.E.2d 850 (Ind. Ct. App. 1989).

286. *Id.*

287. *Id.* at 852. Callander lived in the house from 1976 until he sold it to the Sheridans in August 1979. *Id.* at 851. The facts did not indicate Callander's reason for selling.

288. *Id.* at 852.

289. *Id.*

290. *Id.*

291. *Id.* Other jurisdictions have limited the implied warranty of habitability to commercial builders in the business of building homes and have not created an implied warranty when the vendor is a casual builder. See, e.g., *Dryden v. Bell*, 158 Ariz. 164, 761 P.2d 1068 (1988) (warranty does not apply to house built for personal use); *Siders v. Schloo*, 188 Cal. App. 3d 1217, 233 Cal. Rptr. 906 (1987) (no implied warranty when the sellers were not in the business of selling houses and built the house for their own use); *Dawson Ind. Inc. v.*

In *Deckard v. Ratcliff*,²⁹² Deckard built a house in 1979 and lived in it for approximately eight years before selling the house to the Hendersons, who in turn sold it to the Ratcliffs. The Ratcliffs later sued Deckard alleging a breach of the implied warranty of habitability.²⁹³ In reversing a \$3000 judgment in favor of the plaintiffs, the court of appeals questioned whether Deckard was, in fact, a builder-vendor. He had built the house for his own use and lived in it with his family for eight years before being forced to sell the house because of a drop in his income.²⁹⁴ The majority opinion, however, never reached this issue because it determined that even if he was a builder-vendor, he was never provided an opportunity to repair the defect.²⁹⁵

*D. Requirement that Builder-Vendor be Notified and
Provided Opportunity to Cure Defect*

In *Deckard v. Ratcliff*,²⁹⁶ the court of appeals reversed a \$3000 judgment against the builder-vendor for breach of an implied warranty of habitability because the builder-vendor had not been notified of the alleged defect or given the opportunity to repair it.²⁹⁷ Under Indiana law, notice to the builder-vendor of the alleged defect and the opportunity to repair is a condition precedent to the purchaser's recovery

Godley Constr. Co., 29 N.C. App. 270, 224 S.E.2d 266 (1976) (warranty limited to sale of new dwellings by a builder-vendor in the business of building homes). It is interesting to note that the Indiana Court of Appeals has refused to recognize an implied warranty of habitability in a residential lease by a "non-merchant" landlord. *Zimmerman v. Moore*, 441 N.E.2d 690, 696 (Ind. Ct. App. 1982).

292. 553 N.E.2d 523 (Ind. Ct. App. 1990).

293. *Id.* Indiana has extended the builder-vendor's implied warranty of habitability to subsequent purchasers, thus allowing the Ratcliffs to sue Deckard for an alleged breach of the implied warranty. *Barnes v. Mac Brown*, 264 Ind. 227, 342 N.E.2d 619 (1976).

294. *Deckard*, 553 N.E.2d at 523-24. Several courts have refused to find an implied warranty of habitability when the builder did not build the house for resale to the public but was later forced by economic reasons or a job transfer to sell the house. *E.g.*, *Dryden v. Bell*, 158 Ariz. 164, 761 P.2d 1068 (1988) (warranty does not apply to house built for personal use); *Siders v. Selco*, 188 Cal. App. 3d 1217, 233 Cal. Rptr. 906 (1987) (no implied warranty when the sellers built the house for their own use but were later forced to sell it). However, if the builder is a merchant in the business of selling homes to the public, the fact that the builder lives in the house or rents the house to a tenant prior to offering it for sale does not prevent the imposition of an implied warranty of habitability in the subsequent sale. *E.g.*, *DeRoche v. Dame*, 75 App. Div. 384, 430 N.Y.S.2d 390 (1980); *Mazurek v. Nielsen*, 42 Colo. App. 386, 599 P.2d 269 (1979).

295. *Deckard*, 553 N.E.2d at 523. Judge Staton, in his concurring opinion, considered Deckard a builder-vendor, even though he was not in the business of selling homes. Deckard "assumed the attached liability of a builder-vendor to a subsequent buyer" when he sold the house. *Id.* at 524 (Staton, J., concurring).

296. 553 N.E.2d 523 (Ind. Ct. App. 1990).

297. *Id.*

for breach of the implied warranty of habitability.²⁹⁸ The court found that *Wagner Construction Co. v. Noonan* was dispositive.²⁹⁹ Thus, the court followed the rule that

before a purchaser of a residence may seek damages from the builder-vendor for an alleged breach of implied warranty of fitness for habitation, wherein the damages sought are based upon the cost of repair or diminution in value of the residence, the purchaser must, as a condition precedent to recovery, give notice of the defect and alleged breach of warranty to the builder-vendor thus affording the builder-vendor an opportunity to remedy the defect.³⁰⁰

E. Conditions that Constitute Breach of the Implied Warranty

In *Callander v. Sheridan*,³⁰¹ Callander sold a house to the Sheridans in August 1979. The Sheridans moved into the house in February 1980. That summer, they noticed cracks in the concrete porch and sidewalk, which grew larger over the next few years. They also noticed that four brick pillars supporting the roof overhang began to bow. The trial court found that there was a breach of the implied warranty of habitability and awarded damages.³⁰²

On appeal, Callander claimed there was no breach of the implied warranty of habitability because the house was still habitable.³⁰³ The court rejected this argument, finding that a breach of the implied warranty of habitability is established by proof of a defect that substantially impairs the enjoyment of the residence.³⁰⁴ The evidence admitted at the trial justified the court's finding that the pillars were in imminent danger of collapse and that the defects interfered with the Sheridans' use and enjoyment of the house.³⁰⁵ Thus, the defective

298. *Id.* at 523-24.

299. *Id.* (citing *Wagner Constr. Co., Inc. v. Noonan*, 403 N.E.2d 1144 (Ind. Ct. App. 1980)).

300. *Id.* (quoting *Wagner*, 403 N.E.2d at 1150).

301. 546 N.E.2d 850 (Ind. Ct. App. 1989).

302. *Id.* at 851.

303. *Id.* at 852-53.

304. *Id.* at 853.

305. *Id.* at 852-53. There appears to be disagreement concerning the degree to which the house must be unlivable or uninhabitable before there is a breach of the implied warranty. A few courts appear to require that the defect render the house uninhabitable. *E.g.*, *Aronsohn v. Mandara*, 98 N.J. 92, 103-05, 484 A.2d 675, 681-82 (1984) (the defect must affect habitability); *Stuart v. Caldwell Banker Commercial Group, Inc.*, 745 P.2d 1284, 1289-90 (Wis. 1987) (the

condition does not have to render the house totally uninhabitable or unlivable before there is a breach of the implied warranty.³⁰⁶

In a concurring opinion in *Deckard v. Ratcliff*,³⁰⁷ Judge Staton addressed the liability of the builder-vendor under the implied warranty of habitability in an action by a subsequent purchaser. The alleged defect was an insect problem caused by an improperly vented sewer pipe. Although the Ratcliffs were not the immediate purchasers of the house from Deckard, in *Barnes v. Mac Brown and Company*, the Indiana Supreme Court extended the builder-vendor's implied warranty of habitability to subsequent purchasers.³⁰⁸ The supreme court in *Barnes* limited the implied warranty to latent defects.³⁰⁹ Assuming that the defect was latent,³¹⁰ liability does not automatically follow. Rather, the test is one of reasonableness in light of the surrounding circumstances. Among the factors to be considered in applying the test are the age and maintenance of the home, its use, and any other factors that might aid the fact finder in making this determination.³¹¹

Judge Staton further observed that the legislature had likewise recognized the factual nature of the implied warranty when, in a statute

defect must profoundly compromise the essential nature of the property as a dwelling). Other courts have indicated that the warranty is one of workmanlike quality and if the construction falls below this standard there is a breach of the warranty. *E.g.*, *Gaito v. Auman*, 327 S.E.2d 870, 877 (N.C. 1985) (builder has a duty to perform work in an ordinarily skillful manner); *Griffin v. Wheeler-Leonard & Co.*, 225 S.E.2d 557, 567 (N.C. 1976) (quality, not livability, is the test for breach of warranty); *Evans v. J. Stiles, Inc.*, 689 S.W.2d 399, 400 (Tex. 1985) (builder-vendor warrants both workmanship and habitability).

306. *Callander*, 546 N.E.2d at 853. Several courts have also concluded that a condition need not render the premises unlivable. In *Petersen v. Hubschman Constr. Co., Inc.*, 76 Ill. 2d 31, 389 N.E.2d 1154 (1979), the court suggested the term habitability may be unfortunate and that the warranty is more like the warranty of merchantability and fitness of use contained in the UCC. *Id.* at 41-42, 389 N.E.2d at 1158-59.

307. 553 N.E.2d 523 (Ind. Ct. App. 1990).

308. 264 Ind. 227, 342 N.E.2d 619 (1976).

309. *Id.* at 331, 342 N.E.2d at 621.

310. Judge Staton remarked that according to Indiana law there are three components to a latent defect:

1. It is not discoverable by a purchaser's reasonable inspection;
2. It manifests itself after purchase; and,
3. It substantially impairs enjoyment of the residence.

Deckard, 553 N.E.2d at 524 (Staton, J., concurring).

Judge Staton did not believe that the defect in *Deckard* was latent because the Ratcliffs discovered one of the improperly vented sewer pipes when they inspected the house before the purchase and were on notice that other pipes might be improperly vented. However, for purposes of discussion, he was willing to assume that the defect was latent. *Id.*

311. *Id.* (citing *Barnes*, 342 N.E.2d at 621). *See also* *Gaito v. Auman*, 313 N.C. 243, 327 S.E.2d 870 (1985) (whether there has been a breach of the warranty must be determined on a case-by-case basis) (citing *Barnes v. Mac Brown Co., Inc.*, 264 Ind. 227, 342 N.E.2d 619 (1976)).

permitting the builder-vendor to disclaim the implied warranties in exchange for express statutory warranties, it defined the implied warranties as "unwritten warranties relating to the reasonable expectations of a homeowner with regard to the construction of the homeowner's home, as those reasonable expectations are *defined by the courts on a case-by-case basis*."³¹²

Here the insect problem caused by the improperly vented sewer pipe was discovered almost ten years after the construction of the house was completed. Under the circumstances, Judge Staton concluded that Deckard had no duty to repair because he did not breach the implied warranty of habitability.³¹³

312. *Deckard*, 553 N.E.2d at 525 (quoting IND. CODE § 34-4-20.5-9(b) (1988)).

313. *Id.* (Staton, J., concurring). Judge Staton indicated that findings of fact by the trial court would assist the court of appeals in its review of this factual determination. *Id.*

Developments in Social Security Law

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I. INTRODUCTION

This survey period witnessed four stunning victories for disabled persons seeking Social Security benefits. The landmark United States Supreme Court decision of *Sullivan v. Zebley*¹ greatly expands the ability of poor disabled children to obtain Supplemental Security Income (SSI). *Zebley*, a large class action suit, was the first loss on the merits for the Social Security Administration (the Administration) since 1979 and the first public benefits victory in any program before the Rehnquist Court.² *Zebley* affects hundreds of thousands of children and class members whose applications for benefits have been denied in the past. The decision also has far-reaching implications into other areas of Social Security disability law.

Widows, widowers, and surviving divorced spouses scored substantial victories in their quest for disability benefits in four circuit court decisions during the survey period.³ In two of these decisions, the rationale of

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The authors would like to acknowledge Nancy G. Shor, Executive Director of the National Organization of Social Security Claimants' Representatives, who served as a consultant to the authors in the preparation of this Article. Ms. Shor has been the Executive Director of the National Organization of Social Security Claimants' Representatives for the past ten years. She frequently lectures on Social Security disability issues. She edits the monthly publication *Social Security Forum*, which is devoted to developments in the disability program and the law. She is also the co-editor of Matthew Bender's *Social Security Practice Guide*. She is a graduate of Boston University School of Law.

1. 110 S. Ct. 885 (1990).

2. Weishaupt & Stein, *Supreme Court's Zebley Decision Will Greatly Expand Eligibility for SSI Childhood Disability Benefits and Medicaid*, 12 SOC. SECURITY F. 1, 3 (May 1990).

3. Davidson v. Secretary of Health & Human Servs., 912 F.2d 1246, 1255 (10th Cir. 1990) (the Secretary must consider any medical evidence that is relevant to the residual functional capacity of the claimant for widows' disability benefits); Ruff v. Sullivan, 907 F.2d 915, 919 (9th Cir. 1990) (the Secretary must consider whether a surviving spouse's residual functional capacity precludes her from gainful employment); Cassas v. Secretary of Health & Human Servs., 893 F.2d 454, 458 (1st Cir. 1990) (functional capacity cannot be ignored in considering medical equivalence and, ultimately, disability); Kier v. Sullivan, 888 F.2d 244, 247 (2d Cir. 1989) (district court properly ordered the Secretary to consider widow's residual functional capacity in determining her eligibility for benefits).

Zebley was relied on in part.⁴ Also, Congress has intervened in this area in the 1990 Omnibus Budget Reconciliation Act⁵ by lowering the standard that widows and widowers are required to meet to establish disabilities after January 1, 1991. Considering the sound rationale of *Zebley*, the circuit court decisions, and the statutory amendment by Congress, soon widows and widowers will have greater access to benefits nationwide.

The survey period also contained *Hyatt v. Sullivan*,⁶ a huge class action victory in the Fourth Circuit regarding the assessment of disabling pain and other subjective symptoms. The relief granted by the Fourth Circuit Court represents a bold move in judicial activism and promises to provide more uniformity throughout the circuit courts in this most difficult area of Social Security disability law.⁷

Finally, the Second Circuit's class action suit of *New York v. Sullivan*⁸ is an important development for persons with disabilities resulting from cardiac ischemia. In this decision, the Second Circuit invalidated the Secretary of Health and Human Services' (the Secretary's) practice of exclusive reliance on treadmill test results to deny disability claims.⁹ The decision has national implications because the Secretary's policy regarding reliance on treadmill tests has been implemented nationwide.¹⁰

II. DISABLED CHILDREN - INDIVIDUALIZED ASSESSMENTS

The United States Supreme Court ruled in *Zebley* that the Social Security Administration's refusal to consider functional limitations when evaluating the severity of the physical or mental impairments of children applying for Supplemental Security Income benefits was manifestly contrary to the statutory scheme of the Supplemental Security Income Program.¹¹

4. *Davidson*, 912 F.2d at 252 (*Zebley* makes clear that the function of the listings is to establish a description of impairments that are conclusively presumptive of disability); *Ruff*, 907 F.2d at 919 (relying on the *Zebley* Court's reasoning that the child disability listings do not cover all disability illnesses).

5. Omnibus Budget Reconciliation Act, Pub. L. No. 101-508, § 5703, 104 Stat. 1388 (1990).

6. 899 F.2d 329 (4th Cir. 1990).

7. For a discussion of the law regarding the assessment of pain as a disability, see Ruppert, *Developments in Social Security Law*, 22 IND. L. REV. 401 (1989).

8. 906 F.2d 910 (2nd Cir. 1990).

9. *Id.* at 918.

10. *Evaluating Cardiovascular Impairments: A Focus on Treadmill Tests*, 12 SOC. SECURITY F. 1, 11 (Aug. 1990) [hereinafter *Cardiovascular Impairments*].

11. *Zebley*, 110 S. Ct. at 897. The Supplemental Security Income Program, Title XVI of the Social Security Act, is a social welfare program for the aged, blind, and disabled. See 42 U.S.C. § 1382c(a)(1) (1983 & Supp. 1990). The purpose of the Supplemental Security Income Program is to ensure that the recipient's income is maintained at a subsistence level. Eligibility is based on need. *Whaley v. Schweiker*, 663 F.2d 871, 873 (9th Cir. 1981).

In January of 1984, the district court certified the *Zebley* class including persons "who are now, or who in the future will be, entitled to an administrative determination . . . as to whether supplemental security income benefits are payable on account of a child who is disabled, or as to whether such benefits have been improperly denied, or improperly terminated, or should be resumed."¹² The *Zebley* court noted that every year about 2,000,000 claims for SSI benefits are adjudicated.¹³ Of these, approximately 100,000 are child disability claims.¹⁴ The Supreme Court ruled in *Zebley* that the Administration's child disability regulations have been contrary to the statutory standard for the evaluation of children's disabilities since the inception of the SSI program.¹⁵ Thus, applicants whose claims are denied because the Administration applied illegal standards have the right to reopen their claims.¹⁶ Clearly, the Administration will have to review all denied claims for children's SSI benefits going back at least to 1983.¹⁷ Potentially, any denied claim dating back to the program's inception in 1974 could be reopened.¹⁸ In any event, the Administration will be required to readjudicate hundreds of thousands of claims.

A disabled person is eligible for SSI benefits if his or her income and financial resources is below a certain level.¹⁹ The relevant portion of the statute defining disability reads:

An individual shall be considered to be disabled . . . if he is unable to engage in *any substantial gainful activity*²⁰ by reason

12. *Zebley*, 110 S. Ct. at 889.

13. *Id.* at 888. See also SOCIAL SECURITY ADMINISTRATION, OFFICE OF DISABILITY, PRELIMINARY STAFF REPORT: CHILDHOOD DISABILITY STUDY B-1 (Sept. 20, 1989).

14. *Zebley*, 110 S. Ct. at 888.

15. See *id.* at 894-95.

16. *Bowen v. New York*, 476 U.S. 467, 486 (1986).

17. At a minimum, the Administration will be ordered to go back and examine the cases of children who were denied benefits after May 10, 1983 (sixty days before the filing of the *Zebley* case). *Zebley: New Standards for SSI Benefits for Poor Disabled Children*, 12 SOC. SECURITY F. 1, 4 (Feb. 1990).

18. *Id.*

19. For the income test used to define this level, see 42 U.S.C. § 1382(a) (1983 & Supp. 1990).

20. Substantial gainful activity is work activity that is both substantial and gainful:

(a) *Substantial work activity*. Substantial work activity is work activity that involves doing significant physical or mental activities. Your work may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before.

(b) *Gainful work activity*. Gainful work activity is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually

of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of *comparable severity*).²¹

The Secretary promulgated a five-step test to determine whether an *adult* claimant is disabled.²² The five-step test can be summarized as follows:

- 1) Whether the claimant is engaged in substantial gainful activity. If he or she is, the disability claim is denied.²³ If he or she is not, the decisionmaker proceeds to step two.
- 2) Whether the claimant has a medically severe impairment or combination of impairments.²⁴ If he or she does not, the disability claim is denied.²⁵ If he or she does, the decisionmaker proceeds to step three.
- 3) Whether the claimant's disability meets or equals one of the listed impairments²⁶ that the Administration acknowledges are so severe as to preclude *any gainful activity*. If the disability meets or equals one of the listed impairments, the claimant is con-

done for pay or profit, whether or not a profit is realized.

(c) *Some other activities*. Generally, we do not consider activities like taking care of yourself, household tasks, hobbies, therapy, school attendance, club activities, or social programs to be substantial gainful activity.

20 C.F.R. § 416.972 (1990). For further definition of substantial gainful activity, see 20 C.F.R. §§ 416.910, 416.971 (1990).

21. 42 U.S.C. § 1382c(a)(3)(A) (emphasis added).

22. 20 C.F.R. § 416.920 (1990). In addition to the five-step test, a special procedure is required for mental disabilities. *Id.* § 416.920(a). The definition of disability is the same for adults under Title II and for children under Title XVI. See 42 U.S.C. §§ 401-33 (1983 & Supp. 1990) (Social Security disability), 42 U.S.C. §§ 416(i)(1), 1382c(a)(3)(A) (1983 & Supp. 1990) (SSI). The primary distinctions between the two programs are the purposes and the amount of benefits payable. Social Security disability benefits are unrelated to need and are designed to provide the wage earner and the dependent members of the family with protection against the hardship occasioned by the wage earner's loss of earnings. *Califano v. Jobst*, 434 U.S. 47, 52 (1977). Social Security disability is not simply a welfare program. *Id.* Instead, Social Security disability benefits are based on the disabled person's past earnings. 42 U.S.C. §§ 402, 415.

23. 20 C.F.R. § 416.920(a), (b).

24. The existence of a "severe" impairment must be shown by medical evidence alone. This means that the impairment must have medically demonstrable anatomical, physiological, or psychological abnormalities. 20 C.F.R. § 404.1508 (1990).

25. 20 C.F.R. § 416.920(c).

26. The listed impairments are found at 20 C.F.R. pt. 404, subpt. P, app. 1 (1990).

clusively presumed to be disabled.²⁷ If not, the decisionmaker proceeds to step four.

4) Whether the impairment prevents the claimant from performing work he or she has performed in the past. If the claimant is able to perform his or her previous work, he or she is not disabled.²⁸ If he or she is not able to perform his or her previous work, the decisionmaker proceeds to step five.

5) Whether the claimant is able to perform other work in the national economy in view of his or her residual functional capacity, age, education, and work experience.²⁹ If he or she is

27. 20 C.F.R. § 416.920(d). The meets or equals analysis is conducted upon medical evidence alone without consideration of a claimant's vocational or functional capacity. For a claimant to show that his impairment matches a listing, "the impairment must meet *all* of the specified medical criteria. An impairment that manifests only some of those criteria, no matter how severely, does not qualify." *Zebley*, 110 S. Ct. at 891 (emphasis in original). For a claimant to qualify for benefits by showing that his unlisted impairment, or combination of impairments, is "equivalent" to a listed impairment, he must present medical findings equal in severity to *all* the criteria for the one most similarly listed impairment. See 20 C.F.R. § 416.926(a) (1990). "A claimant cannot qualify for benefits under an 'equivalence' analysis by showing that the overall functional impact of his unlisted impairment or combination of impairments is as severe as that of a listed impairment." *Zebley*, 110 S. Ct. at 892. A claimant cannot qualify if his symptoms, signs, and laboratory findings are not at least equivalent in severity to *all* the criteria of one of the listed impairments regardless of how severely impaired that individual actually is. *Zebley*, 110 S. Ct. at 891-92; [1982-1983 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 14,540 [hereinafter SSR 83-19].

28. 20 C.F.R. § 416.920(e). The fourth step in determining a claimant's disability requires an assessment by the administrative law judge of the claimant's residual functional capacity (RFC). RFC is defined as "what you can still do despite your limitations." *Id.* § 404.1545(a) (1990). RFC is a medical assessment of how much the claimant's ability to function on a job is limited by his or her severe impairments. RFC is measured by the claimant's physical and mental ability to function adequately in a work situation for eight hours a day. Physical RFC is determined by the ability to walk, stand, sit, bend, lift, etc. In addition to these "exertional" limitations, the effects of pain, fatigue and other "nonexertional" limitations are considered in the determination of physical RFC. Mental RFC involves memory, psychological adjustment to work, and other factors that might influence the ability to perform basic work activities. R. GILBERT & J. PETERS, SOCIAL SECURITY DISABILITY CLAIMS § 1:7 (1990) [hereinafter SOCIAL SECURITY DISABILITY CLAIMS].

29. This step is primarily an administrative decision. The administrative law judge is guided by the medical-vocational guidelines and tables known as the "grids." See 20 C.F.R. Pt. 404, subpt. P, app. 2 (1990). The grids are used in addressing the question of whether there is work in the national economy that the claimant can perform. See 20 C.F.R. § 404.1566 (1990). The three tables of the grids correspond to a claimant's RFC defined in terms of the exertional level the claimant is deemed capable of performing on a sustained basis. The categories of RFC are sedentary, light, medium, heavy, and very heavy. *Id.* § 404.1567; SOCIAL SECURITY DISABILITY CLAIMS, *supra* note 28, § 1:8. Resources

able to perform other work, benefits are denied. If not, the claimant is entitled to benefits.³⁰

For the crucial step three analysis, the Secretary has promulgated 125 listed impairments for adults³¹ and 57 additional listed impairments for children.³² The listings are descriptions of "various physical and mental illnesses and abnormalities, most of which are categorized by the body system they affect."³³ Each impairment is defined in terms of several specific medical signs, symptoms, or laboratory test results.³⁴ The Secretary sets the disability criteria for the children's disability listings at the same level of medical severity used for adults.³⁵

Because the listings are examples of medical conditions that ordinarily prevent a person from working or engaging in *any gainful activity*, rather than the statutory standard of *any substantial gainful activity*, they set a higher level of severity than the statutory standard which allows for a finding of disability depending upon the vocational impact of a condition that does not rise to the level of severity of a listed impairment.³⁶ Thus, an adult or child whose impairment meets or equals one of the listed impairments is conclusively presumed to be disabled and entitled to benefits.³⁷

The *Zebley* Court observed that for an adult, if the impairment fails to meet or equal a listing, the evaluation proceeds to the fourth and fifth steps, as set out above, which involve an individual assessment of the claimant's residual functional capacity (RFC).³⁸ These steps are included in what is commonly known as the "vocational factors."³⁹ The

are available that define work which exists in the national economy and that take notice of national patterns of job availability and job requirements: (1) *Dictionary of Occupational Titles*, published by the Department of Labor; (2) *County Business Patterns*, published by the Bureau of the Census; (3) *Census Reports*, also published by the Bureau of the Census; (4) *Occupational Analyses*, prepared for the Social Security Administration by various state employment agencies; and (5) *Occupational Outlook Handbook*, published by the Bureau of Labor Statistics. The grid rule that corresponds to the claimant's RFC, age, education, skills, and prior work experience dictates a decision of disabled or not disabled. See 20 C.F.R. pt. 404, subpt. P, app. 2.

30. See 20 C.F.R. § 416.920(f).

31. 20 C.F.R. pt. 404, subpt. P, app. 1 (pt A).

32. 20 C.F.R. pt. 404, subpt. P, app. 1 (pt B).

33. *Sullivan v. Zebley*, 110 S. Ct. 885, 891 (1990).

34. *Id.*

35. 42 Fed. Reg. 14,705 (1977).

36. *Zebley*, 110 S. Ct. at 892. For a discussion of disability standards, see *supra* note 22 and accompanying text.

37. *Zebley*, 110 S. Ct. at 892.

38. *Id.* (a claimant who does not qualify for benefits under the listings still has the opportunity to show that his impairment prevents him from working).

39. *Davidson v. Secretary of Health & Human Servs.*, 912 F.2d 1246, 1253 (10th Cir. 1990).

evaluation of a disabled adult's claim does not end at the listings because the claimant still has the opportunity to show that his or her impairment in fact prevents the claimant from working.⁴⁰ If a claimant suffers from a less severe impairment than one of the listed impairments, the Secretary must determine whether the claimant retains the ability to perform either his or her former work or some less demanding employment.⁴¹

The Secretary's regulations for a child claimant, however, ended at step three above.⁴² A child only qualifies for benefits if his or her impairment matches or is medically equal to a listed impairment.⁴³ The *Zebley* Court noted that because the listings are set at a higher level of dysfunction than the inability to perform substantial gainful activity, the "listings only" approach also excluded children:

whose impairments are not quite severe enough to rise to the presumptively disabling level set by the listings; children with impairments that might not disable any and all children, but which actually disable *them*, due to symptomatic effects such as pain, nausea, side effects of medication, etc., or due to their particular age, educational background, and circumstances.⁴⁴

The Court noted further that the listed impairments, as a finite set of medical conditions, are necessarily underinclusive.⁴⁵ Finally, the Court noted that the Secretary described the child disability lists as including only the "more common impairments" affecting children.⁴⁶ Several well-known childhood impairments including spina bifida, Down's syndrome, muscular dystrophy, autism, AIDS, infant drug dependency, and fetal alcohol syndrome were omitted from the listings.⁴⁷

The *Zebley* Court, in noting that the child disability statute provides that "SSI benefits shall be provided to children with 'any . . . impairment of comparable severity' to an impairment that would make an adult 'unable to engage in any substantial gainful activity,'" ⁴⁸ held that the Secretary's regulations and rulings requiring children to meet or equal one of the listings in step three, which uses the higher severity standard regardless of how functionally disabled the child might actually be, is

40. *Zebley*, 110 S. Ct. at 893.

41. *Id.*

42. See 20 C.F.R. § 416.924(b)(2), (3) (1990).

43. *Id.*; *Zebley*, 110 S. Ct. at 894.

44. *Zebley*, 110 S. Ct. at 894 (emphasis in original). See also Weishaupt & Stein, *supra* note 2, at 4-5.

45. See *Zebley*, 110 S. Ct. at 893.

46. *Id.*

47. *Id.* at 893 n.13.

48. *Id.* at 897.

"manifestly contrary to statute."⁴⁹ The *Zebley* Court held that if a child fails to qualify for benefits at the third step, the Administration must use an individualized *functional* (rather than vocational) analysis in assessing the impact of an impairment on the child's age-appropriate normal daily activities.⁵⁰ The Secretary's analysis must determine the functional impact of the child's impairment upon the normal daily activities of a child of the claimant's age, including skills related to speaking, walking, washing, dressing, eating, going to school, and playing.⁵¹

The Secretary responded quickly to the *Zebley* decision. On February 26, 1990, SSI adjudicators were instructed "to award benefits to any child whose impairment [meets] the old invalidated standard, and to hold, but not deny, any case which would have been denied under the invalidated standard."⁵² On March 23, 1990, the Administration issued "Interim Standards For Disabled Children" designed to implement the *Zebley* decision.⁵³ Also, the Administration rescinded Social Security Ruling 83-19 entitled "Finding Disability on the Basis of Medical Considerations Alone - The Listing of Impairments and Medical Equivalency."⁵⁴ Because this ruling applies to both adults and children, its implications go beyond *Zebley*.⁵⁵ Some of these implications will be discussed in the next section regarding widows' and widowers' Social Security disability benefit eligibility.

The Interim Standards change the Secretary's analysis in determining whether a child is entitled to benefits in at least two important respects. First, in the step three "meets or equals" analysis, the SSI adjudicator "must consider the overall functional consequences of the impairment upon the child's daily living activities and age-appropriate behavior" in determining whether the child's impairment is equivalent in severity to any listed impairment.⁵⁶ As noted above, the former invalid analysis permitted only medical evidence at step three and no evidence regarding a claimant's functional capacity.⁵⁷ Secondly, the Interim Standards provide for a fourth step for children whose impairments do not meet or equal a listing. In this step, the adjudicator must determine whether the

49. *Id.*

50. *Id.*

51. *Id.*

52. *Interim Standards for Disabled Children Underway*, 12 SOC. SECURITY F. 1, 1 (Mar. 1990) [hereinafter *Interim Standards*].

53. *See id.* at 15.

54. *Id.* at 1.

55. *Id.*

56. *Id.* at 16 (emphasis in original).

57. *See supra* notes 26-27 and accompanying text.

impact of the impairment on the child's ability to function is comparable in severity to that which would make an adult unable to engage in substantial gainful activity.⁵⁸ The adjudicator must make an individualized functional assessment of the child's residual functional capacity incorporating factors such as environmental limitations, pain, treatment that interferes with daily living activities, side effects of medication, periods of incapacity, and hospitalization.⁵⁹ If the adjudicator determines that the individualized functional assessment shows that the child is comparably restricted in his or her ability to engage in activities of daily living or behaviors appropriate to the child's age, the child will be considered disabled.⁶⁰

III. SOCIAL SECURITY DISABILITY BENEFIT ELIGIBILITY TO WIDOWS AND WIDOWERS

During the survey period, four circuit court decisions attacked the Secretary's regulations for adjudicating a widow's or widower's disability benefit eligibility.⁶¹ A widow, widower, or surviving divorced spouse of a deceased wage earner may seek Social Security disability benefits as part of Title II of the Social Security Act on the basis of the deceased worker's earnings record.⁶² The surviving spouse must prove that he or she is between fifty and sixty years old and that the disabling impairment is of a level of severity deemed to be sufficient to preclude an individual

58. *Interim Standards*, *supra* note 52, at 16.

59. *Id.*

60. *Id.*

61. See cases cited *supra* note 3. The analysis in all four opinions is quite similar. For the sake of simplicity, we will discuss the most recent decision, *Davidson v. Secretary of Health & Human Services*, 912 F.2d 1246 (10th Cir. 1990), which incorporated the analysis of the other three opinions.

62. See 42 U.S.C. § 423(d)(2)(B) (1983 & Supp. 1990); 20 C.F.R. § 404.1577 (1990). For the purposes of this discussion, the terms "widow," "widower," and "divorced surviving spouse" will be used interchangeably. A person seeking these benefits must prove his or her status as a widow or widower of a deceased worker as defined under 20 C.F.R. §§ 404.345, 404.347 (1990). A surviving person who was married to an insured worker and was later divorced may qualify for disabled widow[er]'s benefits. The basic rule is that the widow[er] and the insured must have been married for ten years just before the date the divorce became effective and the widow[er] must not be currently married. *Id.* § 404.336.

Benefits for widows and widowers with disabilities provide income for persons who might otherwise fall between the cracks of society's more traditional safety nets. When an insured worker dies, benefits may be available to a surviving widow or widower without work credits of his or her own if certain conditions are met. If the widow[er] is not age sixty and does not have a minor child qualified on the deceased worker's record, benefits will not be payable until the widow[er] reaches age sixty unless the widow[er] is at least fifty years old and is disabled. 42 U.S.C. § 402(e)(1)(B)(i) (1990).

from engaging in *any gainful activity*.⁶³ The standard for widows and widowers is stricter than the standard applied to disabled wage earners because disabled wage earners only need to show an inability to participate in *any substantial gainful activity*.⁶⁴ Further, the regulations explicitly preclude consideration of vocational factors such as the claimant's age, education, and work experience.⁶⁵

For the purposes of this discussion, the Secretary's regulations defining disability are identical to those applied to disabled workers for Social Security disability benefits as explained in the *Zebley* analysis above.⁶⁶ In order to effect the stricter severity standard, however, the analysis of a surviving spouse's eligibility ends at step three. In other words, a surviving spouse is entitled to benefits only if his or her impairment is one contained in, or equivalent to one contained in, the step three regulatory listings of impairments.⁶⁷ As discussed under the *Zebley* analysis, to meet a listing, the claimant must establish *all* of the specified medical criteria.⁶⁸ To equal a listing, the claimant must establish medical findings equal in severity to *all* the criteria for the most similar listed impairment.⁶⁹ A surviving spouse cannot qualify for benefits under the "equivalence" step by showing that the overall functional impact of his or her unlisted impairment or combination of impairments is as severe as that of a listed impairment.⁷⁰

In *Davidson v. Secretary of Health & Human Services*,⁷¹ the Tenth Circuit noted the exquisite irony that a surviving spouse could satisfy the statutory requirement by suffering from a disability that precludes "any gainful activity" and yet fail to qualify for benefits because he

63. A widow, surviving divorced wife, widower, or surviving divorced husband shall not be determined to be under a disability . . . unless his or her physical or mental impairment or impairments are of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity.

42 U.S.C. § 423(d)(2)(B). As the reader may have noticed, this is the identical standard at which the step three listings have been set. See *supra* notes 26-27 and accompanying text. The *Zebley* Court noted that under the Secretary's unlawful regulations, disabled children were required to meet the higher standard reserved for determining the eligibility of disabled widows and widowers under Title II. *Zebley*, 110 S. Ct. at 895.

64. *Ruff v. Sullivan*, 907 F.2d 915, 916 (9th Cir. 1990).

65. 20 C.F.R. § 404.1577.

66. The Secretary has defined more specific procedures for surviving spouses' benefits in 20 C.F.R. §§ 404.1577-78.

67. 20 C.F.R. § 404.1578.

68. See *supra* note 27 and accompanying text.

69. *Davidson v. Secretary of Health & Human Servs.*, 912 F.2d 1246, 1252 (10th Cir. 1990).

70. *Id.*; SSR 83-19, *supra* note 27.

71. 912 F.2d 1246 (10th Cir. 1990).

or she cannot meet or equal a listing.⁷² Therefore, like the *Zebley* Court, the *Davidson* court held that the Secretary's regulations are "manifestly contrary to statute."⁷³

In so holding, the *Davidson* court noted that "[t]he Secretary himself has described residual functional capacity as a medical evaluation."⁷⁴ Accordingly, the Secretary must supplement the mechanical application of the listings or their medical equivalents with medical evidence regarding the claimant's residual functional capacity in determining whether he or she is capable of performing any gainful activity.⁷⁵ In terms of the higher standard applicable to widows and widowers, the Administration must consider RFC in determining whether a severe physical or mental condition is the medical equivalent of a step three listed impairment.⁷⁶

As noted above, the Secretary has instituted Interim Standards for disabled children in the wake of the *Zebley* decision.⁷⁷ One part of this reform was the repeal of SSR 83-19 which applies to both children and adults.⁷⁸ SSR 83-19 contained many restrictions on the Administration's ability to find that an impairment or combination of impairments is medically equivalent to a listed impairment.⁷⁹ For example, it provided that

[i]t is incorrect to consider whether the listing is equaled on the basis of an assessment of overall functional impairment The mere accumulation of a number of impairments also will not establish medical equivalence The functional consequences of the impairments (i.e., RFC), irrespective of their nature or extent, cannot justify a determination of equivalence.⁸⁰

Obviously, the rescission of SSR 83-19 opens the door for widows and widowers nationwide to receive individual assessments of their residual functional capacities in the determination of their eligibility for disability benefits that are now only available in the four above-mentioned circuits. The authors of this Article are of the opinion that, considering the rationale of the *Zebley* decision and the rescission of SSR 83-19, all circuits will soon provide that the Secretary must, upon reaching the third step in the evaluation of a surviving spouse's claim, consider RFC

72. *Id.* at 1254.

73. *Id.*

74. *Id.* at 1253 (citing 45 Fed. Reg. 55,566 (1981)).

75. *Id.* at 1255.

76. *See id.*; *Ruff v. Sullivan*, 907 F.2d 915, 919 (9th Cir. 1990).

77. *See supra* note 54 and accompanying text.

78. *Interim Standards*, *supra* note 52, at 1; SSR 83-19, *supra* note 27.

79. SSR 83-19, *supra* note 27.

80. *Id.* *See also* Weishaupt & Stein, *supra* note 2, at 15.

in determining whether a surviving spouse's severe physical or mental condition is the medical equivalent of a step three listed impairment.

The impact of this new case law, however, is overshadowed by Congress's action in this area. As part of this year's Omnibus Budget Reconciliation Act, Congress has eliminated the stricter disability test for widows' and widowers' claims.⁸¹ Widows and widowers will no longer be required to meet the present strict standard of demonstrating a disability that precludes any gainful activity. Beginning January 1, 1991, the new standard for widow and widower disability claims will be identical to the worker's disability standard.⁸² Widows and widowers who are unable to engage in *substantial* gainful activity because of a disability will qualify for benefits.⁸³

IV. ASSESSMENT OF PAIN

During the survey period, the Fourth Circuit of the United States Court of Appeals handed down *Hyatt v. Sullivan*,⁸⁴ a class action decision of enormous importance in the area of the assessment of pain as a disabling condition. The *Hyatt* decision is an exciting example of courageous judicial activism. The *Hyatt* court referred to the Secretary's persistence in refusing to follow the Fourth Circuit's case law concerning pain assessment as "flout[ing] binding precedents."⁸⁵ The Secretary's policy of nonacquiescence in the circuit court's precedents in this area was the subject of congressional criticism.⁸⁶ The *Hyatt* court set out in its opinion specific language to be used by Fourth Circuit Social Security benefit adjudicators in defining the standard to be applied in the assessment of pain as a disabling condition.⁸⁷

The *Hyatt* class was certified in 1984 and involved the denial and termination of Social Security disability benefits for claims involving diabetes mellitus, hypertension, and pain.⁸⁸ The scope and economic

81. Omnibus Budget Reconciliation Act, Pub. L. No. 101-508, § 5703, 104 Stat. 1388 (1990).

82. *See id.*

83. *Id.*

84. 899 F.2d 329 (4th Cir. 1990). The *Hyatt* decision has a long procedural history: 579 F. Supp. 1154 (W.D.N.C. 1984), *vacated*, 757 F.2d 1455 (4th Cir. 1985), *vacated sub nom.* *Hyatt v. Bowen*, 476 U.S. 1167, *aff'd sub nom.* *Hyatt v. Heckler*, 807 F.2d 376 (4th Cir.1986), *cert. denied sub nom.* *Bowen v. Hyatt*, 484 U.S. 820 (1987), *on remand sub nom.* *Hyatt v. Heckler*, 711 F. Supp. 837 (W.D.N.C. 1989), *aff'd sub nom.* *Hyatt v. Sullivan*, 899 F.2d 329 (4th Cir. 1990).

85. *Hyatt*, 711 F. Supp. at 839.

86. *See Hyatt*, 757 F.2d at 1459-60. H.R. REP. NO. 1039, 98th Cong., 2d Sess. 36-38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3096.

87. *See Hyatt*, 899 F.2d at 337.

88. The class included applicants for and former recipients of disability benefits under both Titles II & XVI of the Social Security Act. *Hyatt*, 711 F. Supp. at 837.

impact of *Hyatt* is staggering.⁸⁹ As of July 28, 1988, the Secretary identified and sent notices to approximately 77,000 class members in North Carolina.⁹⁰ According to one Social Security Administration Office, the average monthly disability benefit in 1988 was \$509.⁹¹ A conservative estimate of the potential liability of the Administration to North Carolina class members, for the year 1988 alone, is \$470,316,000.⁹²

The *Hyatt* lawsuit involved the Administration's adherence to SSR 82-58 in nonacquiescence in Fourth Circuit case law establishing that SSR 82-58 was an erroneous statement of the law regarding the assessment of disabling pain.⁹³ In addition to objective medical evidence of an underlying condition that could reasonably produce the pain alleged, SSR 82-58 and related Social Security rulings and regulations require a claimant to demonstrate objective medical findings that can be used to draw reasonable conclusions about the validity of the intensity, persistence, and effect of the alleged pain on the claimant's work capacity.⁹⁴

The Fourth Circuit, as well as every other Circuit except the D.C. Circuit, has rejected the Secretary's position on pain.⁹⁵ Fourth Circuit case law is well settled that the requirement of objective evidence of the pain's intensity is improper.⁹⁶ Fourth Circuit courts have consistently held that administrative law judges are required to evaluate "the effect of pain on the claimant's ability to work when the pain results from a medically diagnosed physical ailment even though the pain's intensity is shown only by subjective evidence."⁹⁷

The *Hyatt* court granted the class injunctive relief by ordering the Secretary to implement certain instructions.⁹⁸ The pertinent part of the order reads as follows:

89. *Id.* at 838 n.1.

90. *Id.*

91. *Hyatt*, 899 F.2d at 334.

92. *Id.* at 838.

93. *Hyatt*, 899 F.2d at 331.

94. *Id.* at 333. *See also* [1982-1983 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 14,358.

95. *Hyatt*, 899 F.2d at 333 n.3. The precise method for the assessment of pain as a disability, however, has been an on-going subject of controversy. *See* Ruppert, *supra* note 7.

96. *Hyatt*, 899 F.2d at 334.

97. *Id.* *See also* Walker v. Bowen, 889 F.2d 47, 49 (4th Cir. 1989); Foster v. Heckler, 780 F.2d 1125, 1128-29 (4th Cir. 1986).

98. *Hyatt*, 899 F.2d at 336. The *Hyatt* court vacated the district court's decision in part. The district court had gone even further by ordering the Secretary to assist the plaintiff's counsel in monitoring the Secretary's compliance with circuit court law for five years. In addition, the *Hyatt* court ordered the Secretary to issue a specific regulation that is nearly identical to the district court's order. *Id.*

On or before 30 days after the entry of this order, the Secretary will distribute immediately to all administrative law judges and all others within this circuit who look to the Secretary for authority or advice in the decision of social security cases with respect to pain as a disabling condition, the following circuit law with respect thereto. The precise means of distributing the same or of giving effect to the same are left to the Secretary, however the Secretary will make it clear that there will not be any variation from the terms thereof in decision-making in this circuit, absent an order of a court of competent jurisdiction or Act of Congress.

Once an underlying physical or mental impairment that could reasonably be expected to cause pain is shown by medically acceptable objective evidence, such as clinical or laboratory diagnostic techniques, the adjudicator must evaluate the disabling effects of a disability claimant's pain, even though its intensity or severity is shown only by subjective evidence. If an underlying impairment capable of causing pain is shown, subjective evidence of the pain, its intensity or degree can, by itself, support a finding of disability. Objective medical evidence of pain, its intensity or degree (i.e., manifestations of the functional effects of pain such as deteriorating nerve or muscle tissue, muscle spasm, or sensory or motory disruption), if available, should be obtained and considered. Because pain is not readily susceptible of objective proof, however, the absence of objective medical evidence of the intensity, severity, degree or functional effect of pain is not determinative.⁹⁹

In the authors' opinion, this order is the most understandable, most accurate statement of Social Security law regarding the assessment of pain. The authors predict that if the Secretary refuses to adopt regulations recognizing the above standard across the nation, the other circuit courts will eventually adopt the order as law. Thus, the nation will enjoy uniformity in this most difficult area of Social Security law.

V. CARDIAC IMPAIRMENTS

In *New York v. Sullivan*,¹⁰⁰ the Second Circuit examined the Administration's practice of relying exclusively on treadmill tests in the

99. *Id.* at 336-37.

100. 906 F.2d 910 (2nd Cir. 1990).

evaluation of cardiac ischemia¹⁰¹ both to determine whether a claimant's impairments meet the listings and, if not, to determine the claimant's residual functional capacity in disability adjudications pursuant to Titles II and XVI of the Act.¹⁰² The *Sullivan* court criticized the Secretary's listings which state that when a treadmill test is available and ischemia is the only ailment alleged, the results of the treadmill test control the analysis to the exclusion of all other medical findings, including the opinions of the treating physician and other diagnostic tests of an applicant's functional capabilities.¹⁰³

The *Sullivan* court noted that the evidence indicated that the treadmill test resulted in misdiagnosis of ischemic heart disease more than one-third of the time, and that persons who do not show signs of heart disease during a treadmill test may still be severely disabled from ischemia.¹⁰⁴ The court noted further that, in certain circumstances, other widely used procedures, including nuclear tests and angiography, are more reliable than the treadmill test in measuring the severity of ischemic heart disease.¹⁰⁵

Citing *Zebley*, the court held that the Secretary's sole reliance on the treadmill test to the exclusion of other available relevant evidence, violated Congress's requirement that claimants receive individualized disability assessments in the evaluation of their disability claims.¹⁰⁶ The *Sullivan* court held that the Secretary's reliance on the treadmill test also violated the statutory mandate that the Secretary "adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in disability cases."¹⁰⁷ The court concluded that the Secretary must consider all available relevant evidence when evaluating claims of disability based on ischemic heart disease.¹⁰⁸

This class action suit is the first to successfully challenge and invalidate the Administration's treadmill policy.¹⁰⁹ The Administration is

101. Cardiac ischemia is an affliction caused by the narrowing of the arteries, usually because of coronary atherosclerosis, which is the pathological process whereby deposits of cholesterol and other substances narrow and obstruct the artery walls of the heart. When the coronary arteries are blocked, not enough blood, and therefore not enough oxygen, reaches the heart muscle resulting in chest pain or angina upon exertion. *Id.* at 913 (citing E. BRAUNWALD, *HEART DISEASE: A TEXTBOOK OF CARDIOVASCULAR MEDICINE* 1191, 1314 (3rd ed. 1988)).

102. *Id.* at 913-14. See also *Cardiovascular Impairments*, *supra* note 10, at 11.

103. *Sullivan*, 906 F.2d at 914-15.

104. *Id.* at 914.

105. *Id.*

106. *Id.* at 919.

107. *Id.* at 915-16 (quoting 42 U.S.C. § 405(a) (1983 & Supp. 1990)).

108. *Id.* at 919.

109. *Cardiovascular Impairments*, *supra* note 10, at 11.

required to re-examine cases as far back as June 1, 1980.¹¹⁰ Because the Secretary has adopted its treadmill policy nationwide for the evaluation of ischemic heart disease as a disability, this decision has obvious national implications.¹¹¹

VI. CONCLUSION

This survey period saw the Secretary corrected by the courts regarding the application of statutory standards determining disability benefit eligibility in four important areas. The United States Supreme Court's decision in *Zebley* greatly expands the ability of poor disabled children to obtain SSI, and will require the Secretary to readjudicate hundreds of thousands of claims made by disabled children and to promulgate new regulations accurately articulating the statutory standard. The decision of four circuit courts, the rescission of SSR 83-19, and the enactment of the 1990 Omnibus Budget Reconciliation Act will undoubtedly expand the ability of widows and widowers to obtain Social Security disability benefits. The huge Fourth Circuit *Hyatt* class action case involving hundreds of millions of dollars in wrongfully denied benefits should lead to greater uniformity among the circuits in the area of the assessment of disabling pain. Finally, the Second Circuit's decision in *New York v. Sullivan*, which relied in part on *Zebley*, has national implications because it struck down the Secretary's nationwide arbitrary practice of exclusive reliance on treadmill tests in the determination of disabilities based on cardiac ischemia, and requires the Secretary to provide individualized functional assessments of claimants's disabilities in that circuit.

Trends may be impossible to predict in this complex area of law. Perhaps the next survey period will bring more decisions that force the Secretary to amend its practices to comply with Congress's statutory mandates. In the next survey period, perhaps other circuit courts will follow the Fourth Circuit's excellent example of judicial activism in *Hyatt* by imposing far-reaching and significant injunctive relief in ameliorating other unfair and illegal practices by the Secretary. Regardless of what the future may hold, this survey period undisputably witnessed enormous reform in Social Security law.

110. *Id.*

111. *Id.*

Developments in Indiana Tax Law: Further Refinements of the Indiana Tax Court's Jurisdiction, and the Attack on Indiana's Property Tax System

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I. INTRODUCTION

During the survey period there were several significant developments in Indiana taxation. In the property tax area, the Indiana General Assembly directed the Indiana State Board of Tax Commissioners to study the property tax system. The legislature also created a special committee to study the reassessment process. Litigation challenging the very foundations of the property tax system was initiated as well.

Just as important, however, are the developments involving the jurisdiction of the Indiana Tax Court. Even though the Indiana Tax Court is entering its fifth year, questions about its jurisdiction are still being resolved. In 1990, both the Indiana Supreme Court and the Indiana General Assembly limited the Indiana Tax Court's jurisdiction to some degree.

Section II of this Article analyzes the Indiana Tax Court's jurisdiction, including a discussion of the recent jurisdictional changes. Recommendations are made to the Indiana General Assembly for improving the Indiana Tax Court's jurisdiction. Section III of this Article analyzes developments in the property tax area, focusing on the critical review of property taxation that is underway.

II. THE INDIANA TAX COURT'S JURISDICTION

After five years of existence, the basic jurisdictional confines of the Indiana Tax Court now appear to be in place, but a few important questions still linger.

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A. The Statutory Scheme

The enabling statute begins with the statement that the "tax court is a court of limited jurisdiction."¹ It then sets forth the basic jurisdictional framework:

The tax court has exclusive jurisdiction over any case that arises under the tax laws of this state and that is an initial appeal of a final determination made by:

(1) the department of state revenue with respect to a listed tax; or

(2) the state board of tax commissioners.

(b) The tax court also has any other jurisdiction conferred by statute.²

The enabling statute then further defines the Indiana Tax Court's jurisdiction as follows:

The cases over which the tax court has exclusive original jurisdiction are referred to as original tax appeals in this chapter.

The tax court does not have jurisdiction over a case unless:

(1) the case is an original tax appeal; or

(2) the tax court has otherwise been specifically assigned jurisdiction by statute.³

In order to bring an action before the Indiana Tax Court, there must be either a final determination from the Indiana State Board of Tax Commissioners or the Indiana Department of State Revenue,⁴ or there must be some other specific statutory grant of jurisdiction. This framework seems simple enough in the abstract, but has proved troubling in several situations.

B. Appeals from Final Determinations of the Department of Revenue

1. Denials of Claims for Refunds of Listed Taxes.—The Indiana Tax Court's jurisdiction over most final determinations rendered by the Department has been settled since the court's inception. Original appeals involving denials of claims for refunds of the listed taxes of Indiana Code section 6-8.1-1-1, which includes twenty-six different taxes such as the gross income tax and the gross retail and use taxes, clearly go to

1. IND. CODE ANN. § 33-3-5-2(a) (Burns Supp. 1990).

2. *Id.* § 33-3-5-2(a), (b).

3. *Id.* § 33-3-5-2(c).

4. Hereinafter referred to as the "Board" or the "Department."

the Indiana Tax Court. This is so because Indiana Code section 6-8.1-9-1(c), which formerly provided for appeals of denials of claims for refunds to be lodged with a county court, was amended with the creation of the Indiana Tax Court to provide that such appeals must be filed with the Indiana Tax Court.⁵

2. “*Letters of Findings*” as *Final Determinations*.—An issue that has not been squarely addressed is whether a letter of findings issued by the Department of Revenue is a final determination for purposes of appeal to the Indiana Tax Court. In order to address this issue, some background is necessary.

a. Background

Under Indiana Code section 6-8.1-5-1, the Department is required to make a proposed assessment of the amount of tax due when the Department believes the taxpayer has not reported the full amount of tax.⁶ The Department must then mail a notice of the proposed assessment to the taxpayer. The notice is to state that the taxpayer has sixty days to pay the assessment or to file a written protest.⁷

If a protest is filed, a hearing is held at the Department’s “earliest convenient time.”⁸ Then, no later than sixty days after the hearing, or after making a decision when no hearing was requested, the Department must issue a “letter of findings” to the taxpayer.⁹ This chapter dealing with assessment, however, does not provide any further mechanisms for appeal to the courts such as are contained within the chapter dealing with refund claims.¹⁰ The Indiana Tax Court’s enabling statute provides that an appeal can only lie from a “final determination.”¹¹ The question is whether a taxpayer can appeal from a letter of findings.

The first survey article to discuss the tax court implicitly answered this question in the negative and wrote, “In the case of appeals from the revenue department, the taxpayer is statutorily required first to pay the challenged tax, then to file a claim for refund; the statutory appeal lies from the department’s denial of the refund claim.”¹² Since its

5. Compare IND. CODE § 6-8.1-9-1(c) (1982) (appeals from denials of refund claims go to the circuit or superior court) with *id.* § 6-8.1-9-1(c) (Supp. 1985) (such appeals must go to the tax court).

6. IND. CODE ANN. § 6-8.1-5-1(a) (Burns Supp. 1990).

7. *Id.* § 6-8.1-5-1(c).

8. *Id.* § 6-8.1-5-1(c)(1).

9. *Id.* § 6-8.1-5-1(e).

10. IND. CODE § 6-8.1-9-1(c) (1988) (appeal of a decision by the Department on a claim for refund goes to the tax court).

11. IND. CODE ANN. § 33-3-5-2(a) (Burns Supp. 1990).

12. King, *Some Very Significant Developments in Indiana Taxation*, 20 IND. L.

inception, however the tax court has accepted appeals from letters of findings without any objection from the Department.¹³

Until this survey period, such appeals had been accepted without any explicit discussion of whether a letter of findings constituted a final determination under the Indiana Tax Court's enabling statute.¹⁴ In a recent case, however, the Indiana Tax Court noted the issue for the first time.

b. The GasAmerica decision

In *GasAmerica Services, Inc. v. State Department of Revenue*,¹⁵ the Department audited the taxpayer and thereafter issued a proposed assessment of sales taxes. The taxpayer protested the assessment and the Department held a hearing. The Department issued its letter of findings denying the protest, and the taxpayer later paid the assessment.¹⁶

The taxpayer then proceeded directly to the Indiana Tax Court without first filing an administrative claim for refund. The Department moved to dismiss the action by arguing that jurisdiction was lacking because the taxpayer had not filed a claim for refund under section 6-8.1-9-1. The Indiana Tax Court granted the motion and dismissed the appeal.

The opinion easily could be interpreted for the proposition that the only way to the Indiana Tax Court from the Department of Revenue is through the refund procedures of section 6-8.1-9-1. Fortunately, however, the opinion initially provides that its decision is limited to the claim-for-refund setting. The opinion states, "Since the facts of the case at bar only involve a refund, this decision restrictively applies to the situation *where the tax has been paid* and a refund is sought."¹⁷ Judge Fisher held that when a taxpayer has paid the tax, the only route to the Indiana Tax Court is to comply with the statutory refund procedures of section 6-8.1-9-1.

REV. 361, 375 (1987) [hereinafter *1987 Tax Survey*]. Note that the author discussed appeals in the context of the prerequisites for obtaining injunctive relief, an issue that is discussed later in this Article. The *1987 Tax Survey* did not specifically discuss whether a letter of findings would be an appealable final determination.

13. See, e.g., *Keller v. Indiana Dep't of State Revenue*, 530 N.E.2d 787 (Ind. T.C. 1988) (appeal from a letter of findings); *Video Tape Exch. CoOp of Am. v. Indiana Dep't of State Revenue*, 512 N.E.2d 476 (Ind. T.C. 1986) (same). Note that these cases involved petitions for injunctive relief.

14. The issue had been discussed only by one source prior to the survey period. See Jegen & Maley, *The Indiana Tax Court*, § 12, at 12-13 (I.C.L.E.F. 1988, 1990).

15. 552 N.E.2d 860 (Ind. T.C. 1990).

16. *Id.* at 860.

17. *Id.* at 861 (emphasis added).

Judge Fisher elaborated on the issue, but even some of his later discussion could be interpreted as requiring a taxpayer to always go through the administrative refund process before getting to court:

The procedure to be followed to invoke the jurisdiction of this Court when a refund is sought is expressly set forth in I.C. 6-8.1-9-1. Yet, I.C. 6-8.1-5-1 is silent as to the Tax Court. Therefore, the “statutory requirement for the initiation of an original tax appeal,” mentioned in I.C. 33-3-5-11(a), refers to I.C. 6-8.1-9-1. The claim for refund procedure must be followed once the tax is paid.

It may seem unnecessary to require a claim for refund in those cases where the tax has been paid pursuant to the protest procedure to invoke this Court’s jurisdiction. However, it is within the legislature’s prerogative to determine the jurisdiction of this Court. All administrative remedies must be met before the taxpayer can have his day in court. The procedure to be followed in refund cases is set forth in I.C. 6-8.1-9-1. The legislature has seen fit to provide for the administrative step of filing for a claim for refund before appealing to the Tax Court, even if the taxpayer protested the tax payment. Although this may cause duplication of effort and time in cases where the Department reaches the same result after the protest procedure and the claim for refund procedure have been followed, it is not for this Court to go beyond the jurisdiction expressly provided by statute.¹⁸

On balance, it seems that the Indiana Tax Court did not intend to write with such a broad pen so as to suggest that a claim for refund is a prerequisite to jurisdiction in all cases. Rather, the narrow holding of *GasAmerica*, given the facts presented, is that a refund claim must be filed before going to the Indiana Tax Court *when the taxpayer has opted to pay the proposed assessment*.¹⁹ As Judge Fisher stated in the first paragraph above, “The claim for refund procedure must be followed *once the tax is paid*.”²⁰

c. The lingering question

The question remains unanswered as to whether a taxpayer can actually appeal to the Indiana Tax Court from a letter of findings. This

18. *Id.* at 862.

19. *Id.*

20. *Id.* (emphasis added).

narrow issue was not presented in *GasAmerica*. Nonetheless, Judge Fisher did comment on the question in a footnote:

The question which must be answered is whether a Letter of Findings issued after a protest pursuant to I.C. 6-8.1-5-1 is a "final determination" as required under I.C. 33-3-5-2. The [Department] does not suggest that the "Letter of Findings" is not a final determination, so for purposes here the Court will assume and treat the "Letter of Findings" as a final determination.²¹

The footnote is dicta because the case was not resolved on the grounds of whether appeal lies from a letter of findings. To reiterate, the actual holding of *GasAmerica* was that when the tax has been paid, the refund procedures must be attempted before going to Indiana Tax Court.²²

What, then, can be said about the right to appeal from a letter of findings when the tax is *not* paid? First, as noted previously, the Indiana Tax Court routinely has accepted such appeals and the Department has not contested jurisdiction. This, of course, does not prove that jurisdiction exists, for the Indiana Tax Court is a court of limited jurisdiction,²³ and subject-matter jurisdiction cannot be presumed or conferred in such tribunals.²⁴ Thus, this practice of accepting appeals from letters of findings is of only marginal relevance from a legal standpoint, although its practical ramifications are profound.

Second, unlike other matters that go to the Indiana Tax Court, there is no statutory procedure that sets forth timetables and guidelines for appealing a letter of findings. For instance, the statute governing refund claims explicitly sets forth the steps that must be followed to get to the Indiana Tax Court. Section 6-8.1-9-1(c) provides that an appeal from a denial of a refund claim can be filed with the Indiana Tax Court

21. *Id.* at 861 n.1.

22. *Id.* at 862. This is similar to the federal system in which the taxpayer cannot get into United States Tax Court unless there is a notice of deficiency. Once the federal taxpayer pays the deficiency, the United States Tax Court is lost as a forum, and the only avenue of relief is to file a claim for refund and then seek relief in United States District Court or the United States Court of Claims. *See generally* 24A FEDERAL TAX COORDINATOR 2D §§ U-2000-109 (RIA 1990) (discussing litigation before the United States Tax Court and noting that it is the only federal court in which "such controversies can ordinarily be adjudicated before payment of the tax liability in dispute"); FED. TAX CT. R. 13 (notice of deficiency is a prerequisite to tax court jurisdiction).

23. IND. CODE ANN. § 33-3-5-2(a) (Burns Supp. 1990).

24. *See State ex rel. Hight v. Marion Superior Court*, 547 N.E.2d 267, 269 (Ind. 1989) (parties cannot confer subject matter jurisdiction by consent or agreement); *Wolfe v. Tuthill Corp.*, 532 N.E.2d 1, 2 (Ind. 1988) (subject matter jurisdiction can be contested at any time); *Artusi v. City of Mishawaka*, 519 N.E.2d 1246, 1248 (Ind. Ct. App. 1988) (same).

and that such an appeal must be filed within certain time limits.²⁵

One must ask what guidelines would govern appeals from letters of findings. There are no specific time limitations contained within the Indiana Tax Court's enabling statute, and it cannot be assumed that a letter of findings could be appealed at any time, including, say, seventeen years, after a letter was issued. Moreover, prior to the creation of the Indiana Tax Court, the general rule was that the refund statute of section 6-1.1-9-1 was the "taxpayer's exclusive remedy when contesting the legality of a tax."²⁶ These considerations strongly suggest that appeal to the Indiana Tax Court is not authorized from a letter of findings.

A third factor, however, weighs in favor of such jurisdiction. Section 33-3-5-11 of the enabling statute grants the Indiana Tax Court the power to enjoin collection of taxes pending an original tax appeal.²⁷ Such injunctive relief is unnecessary in refund cases because the tax already has been collected, and it is also unavailing in most property tax cases because under Indiana Code section 6-1.1-15-10, taxpayers are basically relieved from paying tax on contested assessment increases during the pendency of a court appeal challenging such increases.²⁸

The right to seek injunctive relief is coupled with and dependent on the filing of an original tax appeal.²⁹ If the only original tax appeals allowed were those involving refund claims of listed taxes and property taxes that are already "stayed" during an appeal, one must ask what purpose is served by the injunction procedure.

In this light, a legitimate argument can be made that the Indiana General Assembly must have contemplated appeals to the Indiana Tax Court from letters of findings. Otherwise, the injunctive relief provisions would indeed serve no purpose, which would be contrary to the rule that statutes are not to be construed in a fashion that renders absurd results.³⁰

In short, there are legitimate arguments for and against finding jurisdiction over appeals from letters of findings. On balance, however,

25. IND. CODE ANN. § 6-8.1-9-1 (Burns Supp. 1990).

26. *Felix v. Indiana Dep't of State Revenue*, 502 N.E.2d 119, 120 (Ind. Ct. App. 1986) (taxpayer challenging intangibles tax, then a listed tax, was required to exhaust remedies by seeking claim for refund); *State v. Meadowood I.U. Retirement Community, Inc.*, 425 N.E.2d 721, 724 (Ind. Ct. App. 1981) (taxpayer could not seek relief from adverse ruling by the Department by means of a declaratory judgment action in circuit court even though no tax assessment had been made, because the statutory remedy of paying the tax and then bringing an action to recover the amounts paid is exclusive).

27. IND. CODE § 33-3-5-11 (1988).

28. *Id.* § 6-1.1-15-10.

29. See *infra* notes 94-123 and accompanying text.

30. *Hatcher v. Lake Superior Court*, 500 N.E.2d 737, 739 (Ind. 1986); *In re Marriage of Lopp*, 268 Ind. 690, 706, 378 N.E.2d 414, 422 (1978), *cert. denied*, 439 U.S. 1116 (1979).

it is submitted that a court of limited jurisdiction needs a more explicit grant of power to hear such appeals. If the issue is ever raised, the proper answer, though unfortunate, might be that the Indiana Tax Court does not have jurisdiction in this setting.

d. Proposed Legislation

In order to resolve the confusion in this area and, just as in the federal tax system, provide for expedited appeals to the Indiana Tax Court without the necessity of first paying the tax, the legislature should take immediate action. The following proposals are submitted for consideration, with italicized text constituting new language:

Indiana Code § 6-8.1-5-1, dealing with proposed assessments and Letters of Findings issued by the Department of Revenue, should be amended as follows:

IND. CODE § 6-8.1-5-1(d)

(1) The taxpayer may appeal any adverse portion of a letter of findings issued by the Department of Revenue if the taxpayer has not paid the tax at issue. Any such appeal must be taken to the Indiana Tax Court. Letters of findings shall constitute "final determinations" under the Indiana Tax Court's enabling statute. Ind. Code § 33-3-5-1.

(2) The tax court does not have jurisdiction over an appeal from a letter of findings if:

(a) the appeal is filed more than ninety (90) days after the date the Department mails the letter of findings to the taxpayer, or

(b) the taxpayer has already filed an appeal under Indiana Code section 6-8.1-9-1 concerning the same matter after an adverse ruling on a claim for refund.

(3) If a taxpayer appeals a letter of findings to the Indiana Tax Court under this subsection, such taxpayer may not thereafter appeal a denial of a refund claim concerning the same matter to the Indiana Tax Court under Ind. Code § 6-8.1-9-1.

(4) The taxpayer appealing a letter of findings to the tax court may seek injunctive relief under Ind. Code § 33-3-5-11(b).

Such amendments, or something similar, would enhance Indiana's system of adjudicating tax issues. The Indiana Tax Court's practice of accepting such appeals without objection from the Department shows that this system is workable. The statute should be amended to make the workable unambiguously legal.

3. *Death Taxes.*—Prior to the survey period, there had been great debate concerning the Indiana Tax Court's jurisdiction over Indiana estate and inheritance tax matters. Unlike many other statutory provisions

that predated the Indiana Tax Court and that were amended in 1985 to leave no doubt that an appeal would go to the Indiana Tax Court, the statutory provisions governing the death taxes were not amended. For instance, Indiana Code section 6-4.1-10-4 provided that an appeal from the Department's order on a claim for refund of a death tax matter was to be filed in an appropriate county probate court.³¹ Such provisions were in apparent conflict with the Indiana Tax Court's purported exclusive jurisdiction.

a. The initial solution

The Indiana Tax Court confronted this issue several years ago in *Blood v. Poindexter*.³² In *Blood*, the taxpayer, well aware of the jurisdictional ambiguity, filed duplicative actions concerning Indiana death taxes in a county circuit court and the Indiana Tax Court. The Department requested Judge Fisher to exercise exclusive jurisdiction. Judge Fisher assumed such jurisdiction, reasoning that the jurisdictional statutes that had not been amended upon the creation of the Indiana Tax Court were effectively repealed. Judge Fisher noted that to hold otherwise would thwart the goal of state-wide uniformity in taxation that was behind the creation of the Indiana Tax Court.³³ The *Blood* decision remained the law of Indiana on this issue because the matter was not appealed to the Indiana Supreme Court.

b. The legislature's solution

In 1990, however, the Indiana General Assembly entered the foray. Responding to concerns that the administration of an estate in the county probate court could be impeded by a separate appeal of tax issues to the Indiana Tax Court, the legislature effectively repealed the *Blood v. Poindexter* decision. The legislature effected this change by amending one statute and adding two others. As to probate court redeterminations of inheritance tax, the new statute provides:

IND. CODE § 6-4.1-7-7. APPEAL TO TAX COURT. A probate court's redetermination of inheritance tax under this chapter may be appealed to the tax court in accordance with the rules of appellate procedure.³⁴

31. IND. CODE § 6-4.1-10-4 (1984). See also *id.* § 6-4.1-7-5 (appeals of inheritance tax determination of appraisals concerning nonresident's property go to probate courts); *id.* § 6-4.1-10-5 ("the probate court may determine the amount of any tax refund due").

32. 524 N.E.2d 824 (Ind. T.C. 1988).

33. *Id.*

34. IND. CODE ANN. § 6-4.1-7-7 (Burns Supp. 1990).

The amended provision for probate court rulings on inheritance tax and estate tax refund claims reads:

IND. CODE § 6-4.1-10-5. DETERMINATION OF AMOUNT OF TAX REFUND - APPEAL. When an appeal is initiated under section 4 of this chapter, the probate court shall determine the amount of any [inheritance or Indiana estate] tax refund due. Either party may appeal the probate court's decision to the tax court in accordance with the rules of appellate procedure.³⁵

Finally, the new statutory provision concerning appeals involving estate tax determinations reads:

IND. CODE § 6-4.1-11-7. APPEAL TO TAX COURT. A probate court's final determination concerning the amount of Indiana estate tax owing under this chapter may be appealed to the tax court in accordance with the rules of appellate procedure.³⁶

With these changes, the legislature made clear that the probate courts, rather than the tax court, are to initially review the Department's decisions on claims for refunds of death taxes, and that the probate courts are to make all redeterminations of inheritance tax and final determinations of estate tax.³⁷ Appeals from such decisions then go to the Indiana Tax Court, which will thus act like a true appellate court in its review of death tax matters.³⁸

c. Lingering questions

The statutory changes, however, raise several questions of their own. Each provision states that an appeal may be taken to the Indiana Tax Court "in accordance with the rules of appellate procedure."³⁹ If, as it appears, this reference is meant to incorporate the Indiana Rules of Appellate Procedure, the ramifications are significant, for some of the general appellate rules conflict with the appellate procedures specifically set forth for the Indiana Tax Court.

For instance, the Indiana Tax Court's enabling statute and its rules state that original tax appeals are initiated by filing "a petition in the

35. *Id.* § 6-4.1-10-5.

36. *Id.* § 6-4.1-11-7.

37. For a concise summary of how death taxes are administered in probate courts, see 3A THE PROBATE LAW AND PRACTICE OF THE STATE OF INDIANA 374-77 (J. Grimes 7th ed. 1980 & Supp. 1989).

38. It is assumed that the use of the word "may" in the statute is not meant to allow an appeal to go to the Indiana Tax Court or the Indiana Court of Appeals. See IND. CODE ANN. §§ 6-4.1-7-7, -10-5, -11-7.

39. *Id.* §§ 6-4.1-7-7, -10-5, -11-7.

tax court.”⁴⁰ General civil appeals, however, are “initiated by filing with the clerk of the trial court a praecipe designating what is to be included in the record of the proceedings.”⁴¹ “The praecipe shall be filed within thirty (30) days after the entry of a final judgment or an appealable final order”⁴²

Thus, as a preliminary matter, there is a difference in how the appeal must be initiated under the two sets of rules, with the Indiana Tax Court provisions for original tax appeals requiring only a petition in the Indiana Tax Court, and the general appellate rules requiring a praecipe to be filed in the trial court. In light of the 1990 amendment to the Indiana Tax Court’s statute providing that the “tax court also has any other jurisdiction conferred by statute,”⁴³ it appears that jurisdiction would be properly invoked by following only the general appellate rules in death tax cases. Nonetheless, in order to be safe in death tax appeals, practitioners would be wise to file both a praecipe with the probate court under Indiana’s Rules of Appellate Procedure, as well as a petition with the Indiana Tax Court under its statute and rules.

A more substantive difference, however, exists concerning *when* the probate court’s decisions can be appealed. Under Appellate Rule 4(A), appeals may only be taken from “final judgments” and from a limited class of interlocutory orders.⁴⁴ The question arises whether the final judgment requirement of the appellate rules is applicable. If so, the next inquiry is whether a probate court’s rulings on these death tax issues constitute appealable final judgments.

Initially, one could argue that the statutes granting the Indiana Tax Court jurisdiction over death tax appeals allow for immediate appeal without regard to final judgment considerations. Recall that the inheritance tax statute allows appeals to the Indiana Tax Court from “re-determinations of inheritance tax”⁴⁵ The estate-tax provisions allow such an appeal from the “probate court’s final determination concerning the amount of estate tax owing”⁴⁶ As to refund claims, the statute permits either party to appeal the “probate court’s decision”⁴⁷

40. IND. CODE § 33-3-5-11(a) (1988); IND. TAX CT. R. 3.

41. IND. APP. R. 2(A).

42. *Id.*

43. IND. CODE ANN. § 33-3-5-2(b) (Burns Supp. 1990).

44. IND. APP. R. 4(A) (“Appeals may be taken by either party from all final judgments of circuit, superior, probate, criminal, juvenile, county, and where provided by statute for municipal courts.”).

45. IND. CODE ANN. § 6-4.1-7-7 (Burns Supp. 1990).

46. *Id.* § 6-4.1-11-7.

47. *Id.* § 6-4.1-10-5.

Given the purpose of the statutory changes, it seems that the legislature intended to allow appeal from each particular determination without consideration of the final judgment rule.

Nonetheless, each provision also states that such appeals are to be "in accordance with the rules of appellate procedure."⁴⁸ Rule 4(a) of these rules requires a final judgment before taking an appeal.⁴⁹ In light of the strict construction normally accorded jurisdictional provisions,⁵⁰ the final judgment requirements are probably applicable to such death tax appeals.

Unfortunately, neither the trial rules nor appellate rules define the term "final judgment." The Indiana Supreme Court has written that an order is a final judgment if the "matter ruled upon was put to rest."⁵¹ "A judgment may be final and appealable even if it does not dispose of all the issues as to all the parties in the trial court, provided it disposes of a distinct and definite branch of the litigation."⁵²

Applying this standard to the "determinations" at issue, it is seen that the final judgment obstacle should be satisfied in each instance. For "decisions" concerning the tax refund due under Indiana Code section 6-1.4-10-5, all issues are resolved between the parties with the probate court's decision. The same is true of "final determinations" of estate tax under Indiana Code section 6-4-1.11-7. Similarly, for redeterminations of inheritance tax that are appealable under Indiana Code section 6-4.1-7-7, nothing remains to be adjudicated between the Department and any persons involved when such a "redetermination" of the tax is made by the probate court.⁵³

48. *Id.* §§ 6-4.1-7-7, -10-5, -11-7.

49. IND. APP. R. 4(A).

50. *See, e.g., State ex. rel. Consol. City of Indianapolis v. Indiana Tax Court*, No. 49S00-9010-OR-689 (Ind. Nov. 1, 1990) (holding that tax court lacks jurisdiction over injunctive relief petitions when no original tax appeal is on file).

51. *Richards v. Crown Point Community School Corp.*, 256 Ind. 347, 350, 269 N.E.2d 5, 7 (1971).

52. *Id.* *See also In re Green*, 525 N.E.2d 634, 635 (Ind. Ct. App. 1988) ("Generally, a final judgment is one which disposes of all the issues as to all the parties and puts an end to the matter in question.").

53. Note, however, that original "determinations" of inheritance tax made by the probate court pursuant to Indiana Code § 6-4.1-5-10 are apparently not appealable, at least not to the Indiana Tax Court, for only redeterminations and decisions reviewing denials of refund claims are appealable to the Indiana Tax Court. Thus, a probate court's initial "Order Determining Inheritance Tax Due," which is often completed on Form IH-9 of the Department, is not appealable to the Indiana Tax Court. By not allowing an appeal to the Department, the legislature has in essence required a motion to correct errors, in the form of a petition for rehearing under Indiana Code § 6-4.1-7-1, as a prerequisite to appealing to the Tax Court. *See* IND. CODE § 6-4.1-7-1 (1984). This effect contrasts with the recent amendments to Trial Rule 59(A) that make a motion to correct errors permissive in most cases. IND. R. TRIAL P. 59(A).

Although the administration of the estate may continue after such decisions, the adversarial posture taken over the death tax issues has subsided. Thus, if Appellate Rule 4(A)'s final judgment requirement applies to these death tax appeals, the prerequisite should be satisfied in each instance, and the appeals should proceed to the Indiana Tax Court.⁵⁴

Thus, it appears that Indiana's Rules of Appellate Procedure apply to appeals of death tax issues from probate courts to the Indiana Tax Court. Counsel involved in such appeals should review these rules as well as the Rules for the Indiana Tax Court and ensure compliance with both.

d. Proposed legislation

In order to clarify how appeals from the probate courts should proceed to the tax court, a few technical corrections are warranted. First, each of the provisions allowing appeal of death tax issues to the Indiana Tax Court should be amended to make clear that the Indiana Rules of Appellate Procedure apply, rather than using a nondescript reference to "the rules of appellate procedure."⁵⁵ Second, these provisions should also state that the probate courts' decisions are to be considered final judgments for purposes of appeal. Third, it should be made clear that appeals can only go to the Indiana Tax Court, and not to the Indiana Court of Appeals.

The proposed amendments, with new language italicized and deleted language stricken, would read:

IND. CODE § 6-4.1-7-7 — A probate court's redetermination of inheritance tax under this chapter may be appealed to the tax court in accordance with ~~the rules of appellate procedure~~ *the Indiana Rules of Appellate Procedure*. *Such redeterminations shall be considered final judgments for purposes of appeal to the tax court. Appeal from a probate court's redetermination of inheritance tax may not be taken to the Indiana Court of Appeals.*

IND. CODE § 6-4.1-10-5 — When an appeal is initiated under section 4 of this chapter, the probate court shall determine the amount of any tax refund due. Either party may appeal the

54. To ensure appealability, practitioners could alternatively seek to have the probate court's decision certified as a final judgment under Trial Rule 54(B), or certified as an appealable interlocutory order under Appellate Rule 4(B)(6). See IND. R. TRIAL P. 54(B); IND. APP. R. 4(B)(6). If nothing else, such an awkward request would demonstrate the true finality of these decisions.

55. IND. CODE ANN. §§ 6-4.1-7-7, -10-5, -11-7 (Burns Supp. 1990).

probate court's decision to the tax court in accordance with ~~the rules of appellate procedure~~ *the Indiana Rules of Appellate Procedure*. Such decisions by the probate court shall be considered final judgments for the purposes of appeal to the tax court. Appeal from a probate court's determination of any tax refund due may not be taken to the Indiana Court of Appeals.

IND. CODE § 6-4.1-11-7 — A probate court's final determination concerning the amount of Indiana estate tax owing under this chapter may be appealed to the tax court in accordance with ~~the rules of appellate procedure~~ *the Indiana Rules of Appellate Procedure*. Such final determinations shall be considered final judgments for purposes of appeal to the tax court. Appeal from a probate court's final determination of Indiana estate tax may not be taken to the Indiana Court of Appeals.

Also, in order to make it clear that the Indiana Tax Court has jurisdiction over certain cases besides original tax appeals (which are defined by statute to include only appeals from final determinations of the Department or of the Board), and to avoid any confusion over what constitutes an original tax appeal, the tax court's enabling statute should be amended as follows:

IND. CODE § 33-3-5-2(b) — The tax court also has any other jurisdiction conferred by statute, *including jurisdiction over certain inheritance tax and Indiana estate tax matters as set forth in Title 6, Article 4.1 of the Indiana Code*. Such appeals shall not be known as original tax appeals, but instead shall be referred to simply as "tax appeals."

Similarly, the Indiana Supreme Court should amend Tax Court Rule 2 as follows:

TAX COURT RULE 2

~~ONE~~ TWO FORMS OF ACTION

(A) In the Indiana Tax Court, there shall be ~~one~~ two forms of action in the nature of a civil action, to be known as an "original tax appeal." *Appeals from final determinations of the State Board of Tax Commissioners or Department of Revenue shall be referred to as "original tax appeals."* All other appeals specifically conferred by statute to lie in the Indiana Tax Court shall simply be known as "tax appeals."

(B) An original tax appeal is an action that arises under the tax laws of the State of Indiana by which an initial judicial appeal of a final determination of the Department of State Revenue or the State Board of Tax Commissioners is sought.

These amendments, or something to their effect, would clarify the Indiana Tax Court's jurisdiction and simplify practice before this tribunal.⁵⁶

C. Appeals from Final Determinations of the State Board of Tax Commissioners

The Indiana Tax Court's enabling statute creates jurisdiction over appeals from final determinations of the Board.⁵⁷ Despite this seemingly clear grant of jurisdiction, there is still debate over what types of property tax appeals can be heard by the Indiana Tax Court.

1. *Final Determinations.*—First, it remains clear that the Indiana Tax Court has jurisdiction over appeals of final assessment determinations made by the Board under Indiana Code sections 6-1.1-15-4⁵⁸ and 6-1.1-15-5.⁵⁹ Indeed, the latter provision was specifically amended in 1985 to provide that such appeals “shall be taken to the tax court.”⁶⁰

2. *Property Tax Refund Claims.*—What remains an issue, however, is whether the Indiana Tax Court has jurisdiction over property tax refund claims. Additional background is necessary to evaluate this question.

56. The reference to “tax appeals” is admittedly awkward. The proposal here is simply meant to clarify that the tax court has jurisdiction over more actions than just “original tax appeals.” Indeed, besides appeals from probate courts in death-tax matters, the tax court also has jurisdiction to bind a delinquent taxpayer into receivership, IND. CODE § 6-8.1-8-6(b) (1988), to address the Board's final assessment of a public utility company's distributable property, *id.* § 6-1.1-8-30, and to hear any suit against the state involving the Indiana gasoline tax, *id.* § 6-6-1.1-1206. Whatever methodology is used to make clear that the tax court can hear more actions than just “original tax appeals” is satisfactory, including abandoning the “original tax appeal” language entirely.

Another issue that is a candidate for direction from the legislature is whether appeals can be taken from initial “determinations” of inheritance tax made under IND. CODE § 6-4.1-5-10 (1988). As discussed *supra* note 54, such determinations are not appealable to the tax court at the present time. It does not appear that such determinations would be final judgments that could be appealed to the Indiana Court of Appeals. If they are, the goal of uniformity in tax litigation via the Indiana Tax Court would not be realized.

57. IND. CODE ANN. § 33-3-5-2(a)(2) (Burns Supp. 1990).

58. IND. CODE § 6-1.1-15-4(e) (1988) (allowing judicial review when the Board fails to conduct a hearing within 12 months after receiving a petition in a nonreassessment year or 24 months in a reassessment year).

59. *Id.* § 6-1.1-15-5(b) (Supp. 1990) (allowing judicial review of the Board's final determination on assessment of tangible personal property).

60. *Id.* The provisions of Indiana Code § 6-1.1-15-4 did not need to be amended because this code section states that an appeal may be taken under Indiana Code § 6-1.1-15-5 in the same manner as if the Board had made a final determination. IND. CODE § 6-1.1-15-4 (1988).

a. Background

By statute, the taxpayer may file a claim for refund of all or a portion of a property tax installment that has been paid.⁶¹ The refund claim is filed with the county auditor, and the auditor forwards the claim to the Board for "review."⁶² However, the Board merely certifies its "approval or disapproval on the claim and [then] return[s] it to the county auditor."⁶³

After the Board approves or disapproves of the claim and returns it to the county auditor,⁶⁴ the auditor submits the claim to the "county board of commissioners for final review."⁶⁵ The county board of review then has discretion to disallow a claim that the Board has approved,⁶⁶ but has no discretion to allow a claim that was disapproved by the Board.⁶⁷

This review scheme further provides that when "the county board disallows a claim, the claimant may appeal that decision to the county circuit court."⁶⁸ Thus, unlike other tax provisions, the property tax refund sections were not amended to specifically provide for appeals to the Indiana Tax Court.

This statutory framework creates jurisdictional problems. As the author of this section of the 1987 survey edition wrote:

It therefore appears that a sound argument can be made that the new tax court has no jurisdiction over property tax refund claims since (1) the state tax board does not make the final determination of the refund claim, and (2) the judicial review provision specifying appeals to the circuit court was left intact.⁶⁹

61. *Id.* § 6-1.1-26-1.

62. *Id.* § 6-1.1-26-2(a). The Board reviews such claims if the claim is for the refund of taxes paid on an assessment made or determined by the Board, *id.* § 6-1.1-26-2(a)(1), or if the claim is based upon "illegal" taxes or mathematical errors in the computation of the assessment, *id.* § 6-1.1-26-2(a)(2). Under Indiana Code § 26-1.1-26-3, a more traditional "appeal" route (rather than simple forwarding "review") is used for refund claims not covered by Indiana Code § 6-1.1-26-2. *Id.* §§ 6-1.1-26-2, 26-1.1-26-3. Presumably, this would only include a claim for refund based on the ground listed in Indiana Code § 6-1.1-26-1(4)(a)(1) that taxes on the same property have been assessed and paid more than once for the same year, because section 2 of chapter 26 incorporates all other grounds upon which a claim for refund could be based. *Id.* § 6-1.1-26-1(4)(a)(1).

63. *Id.* § 6-1.1-26-2(b).

64. *Id.*

65. *Id.* § 6-1.1-26-4(a).

66. *Id.* § 6-1.1-26-4(c).

67. *Id.* § 6-1.1-26-4(b)(1).

68. *Id.* § 6-1.1-26-4(c).

69. 1987 *Tax Survey*, *supra* note 12, at 365.

b. The Herff Jones case

Judge Fisher addressed this issue that same year in *Herff Jones, Inc. v. State Board of Tax Commissioners*.⁷⁰ In *Herff Jones*, the taxpayer filed duplicative actions in a circuit court and the Indiana Tax Court because of the conflicting statutes governing property tax and the Indiana Tax Court. The State filed a petition asking Judge Fisher to assert exclusive jurisdiction; Judge Fisher held that the Indiana Tax Court had jurisdiction.⁷¹

The holding of the *Herff Jones* decision, however, is not that the Indiana Tax Court has jurisdiction over property tax refund claims. Rather, Judge Fisher merely held that it had jurisdiction because the action before it was in reality an appeal from the Board's ruling on a petition for correction of errors filed under Indiana Code section 6-1.1-15-12, as opposed to a refund claim.⁷² This issue arose because the taxpayer had filed a petition for correction of errors with the county auditor, but had also asked for a refund on the same form. Judge Fisher determined that the administrative action was actually one involving a petition for correction of errors rather than a claim for refund.⁷³ Judge Fisher could exercise jurisdiction because most final determinations of such petitions by the Board are appealable to the Indiana Tax Court.⁷⁴

In dicta, however, Judge Fisher went on to write that even if the matter were treated as a denial of a refund claim under section 6-1.1-26-4, the Indiana Tax Court would have exclusive jurisdiction.⁷⁵ Judge Fisher reasoned that the legislature's goal of uniformity in Indiana tax adjudications would be frustrated if such appeals were taken to the county circuit courts.⁷⁶

The *Herff Jones* decision has been called "clearly debatable"⁷⁷ by previous survey authors, for as has been pointed out, section 6-1.1-26-4(c) does expressly state that "[w]hen the county board disallows a claim,

70. 512 N.E.2d 485 (Ind. T.C. 1987).

71. *Id.* at 491.

72. *Id.*

73. *Id.* at 489-91.

74. *Id.* at 489. Note, however, that there are some situations in which a petition for correction of errors under Indiana Code § 6-1.1-15-12 is not appealable to the tax court because the Board does not act on such petitions. Specifically, petitions brought under subdivisions (1)-(5) of this code section do not involve the Board and thus cannot be the basis of a final determination by the Board. 1987 *Tax Survey*, *supra* note 12, at 365-66 (discussing issue); Dlouhy & King, *Significant Developments in Indiana Taxation*, 21 IND. L. REV. 383, 390 (1988) [hereinafter 1988 *Tax Survey*].

75. *Herff Jones*, 512 N.E.2d at 491.

76. *Id.*

77. 1988 *Tax Survey*, *supra* note 74, at 393.

the claimant may appeal that decision to the *county circuit court*.”⁷⁸ Some have stated that the Indiana Tax Court had to “turn its back completely on the clear and unambiguous language” of this code section to assert exclusive jurisdiction.⁷⁹

Judge Fisher did deal with this provision, however, by reasoning that “the Legislature understood statute 26-4(c) to address only those appeals in which the county board has discretion to allow or disallow the claim”⁸⁰ One must recall that section 26-4(b)(1) requires the county board to disallow a refund claim that was disapproved by the Board.⁸¹ Arguably, nothing in section 26-4 speaks to how such ministerial decisions by the county board should be appealed.

Indeed, a legitimate argument can be made that the Indiana Tax Court correctly decided that the section’s reference to the circuit courts applies only to situations in which the county board has discretion. The statute reads:

(c) Except as provided in subsection (b) of this section [which states that the county board shall disallow a claim if the Board disapproved of it], the county board of commissioners may either allow or disallow *a refund claim* which is submitted to it for final review. When the county board disallows *a claim*, the claimant may appeal that decision to the county circuit court⁸²

It is possible to conclude that the “claim” referred to in the language “When the county board disallows a claim”⁸³ means only a “claim”⁸⁴ over which it has discretion. Indeed, the first sentence specifically excludes the ministerial decisions described in subsection (b) from the rest of subsection (c).

This is, in essence, what Judge Fisher concluded. His interpretation of the statute could be further bolstered by the canon of statutory construction known as the “rule of the last antecedent.”⁸⁵ Under this doctrine, qualifying words correspond to and describe words or phrases immediately preceding them, and ordinarily do not refer to others more

78. IND. CODE § 6-1.1-26-4(c) (1988) (emphasis added).

79. 1988 *Tax Survey*, *supra* note 74, at 394.

80. *Herff Jones*, 512 N.E.2d at 490.

81. IND. CODE § 6-1.1-26-4(b)(1).

82. *Id.* § 6-1.1-26-4(c) (emphasis added).

83. *Id.*

84. *Id.*

85. *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801, 804 (9th Cir. 1989); *Yasuda Fire & Marine Ins. Co. v. Lake Shore Elec. Corp.*, 744 F. Supp. 864, 872 (S.D. Ind. 1990).

remote.⁸⁶ Here, the “claim” referred to in the second sentence of subsection (c) could well be limited to the “claim” referred to in the preceding sentence.⁸⁷ Because the “claim”⁸⁸ in the first sentence is one in which the county board has discretion, the Indiana Tax Court’s conclusion that subsection (c) does not apply to ministerial decisions of the county board is reinforced.⁸⁹

On the other hand, the third sentence of subsection (c) dealing with appeals to circuit courts states that if the claimant “initiates an appeal, any board, officer, or commissioner who disapproved or disallowed the claim may be made a defendant to the action.”⁹⁰ Here the reference to “any board” that “disapproved” the claim can only mean the Board’s “disapproval” of a claim, for the statute uses the term “disapprove” with respect to the Board. Because such disapproved claims are then automatically and ministerially “disallowed” by the county board under section 26-4(b)(1), it would seem that appeals to circuit courts under subsection (c) would include such ministerial disallowances by county boards.⁹¹

In any event, it is not the purpose nor the province of this Article to say definitively whether the *Herff Jones* dicta is correct. Certainly there are legitimate arguments on both sides, but at present the dicta is controlling in Indiana tax litigation as the issue has not reached the Indiana Supreme Court. Indeed, it is possible that the issue will never be raised, for the Board took the position in *Herff Jones* that the Indiana Tax Court has exclusive jurisdiction, and it is unlikely to change its views on the matter in the future. Thus, the issue probably will be raised only if a taxpayer desires to remain in circuit court.

Nonetheless, the issue is one of jurisdiction. Because the Indiana Tax Court is a court of limited jurisdiction, its very power to adjudicate cannot be implied. Jurisdiction cannot be conferred by the parties,⁹² and when jurisdiction appears lacking, the issue must be addressed by the Indiana Tax Court and, when a case is appealed further, by the Indiana Supreme Court.

86. *Wilshire*, 881 F.2d at 804; *Yasuda*, 744 F. Supp. at 872.

87. IND. CODE § 6-1.1-26-4(c) (1988).

88. *Id.*

89. *Herff Jones, Inc. v. State Board of Tax Comm’rs*, 512 N.E.2d 485, 490 (Ind. T.C. 1987).

90. IND. CODE § 6-1.1-26-4(c).

91. *Id.* § 6-1.1-26-4(b)(1), (c).

92. See *State ex rel Hight v. Marion Superior Court*, 547 N.E.2d 267, 269 (Ind. 1989) (parties cannot confer subject matter jurisdiction by consent or agreement); *Wolfe v. Tuthill Corp.*, 532 N.E.2d 1, 2 (Ind. 1988) (subject matter jurisdiction can be contested at any time); *Artusi v. City of Mishawaka*, 519 N.E.2d 1246, 1248 (Ind. Ct. App. 1988) (same).

c. *The need for legislation*

As has been suggested before,⁹³ there are two important considerations remaining because of the jurisdictional uncertainty. First, practitioners appealing property tax refund claims would still be wise to file duplicative actions in the appropriate circuit court and the Indiana Tax Court. Otherwise, their clients could find themselves bumped out of court for want of jurisdiction.

Second, and just as important, it is time for legislative action to correct the remaining ambiguity. Indiana taxpayers deserve a straightforward system free of uncertainties for appealing property tax issues to the courts; they have not received this. In order to clear up the confusion, the following proposal is submitted, with italicized words representing new language and stricken words representing deleted language:

Indiana Code section 6-1.1-26-4(c) would be amended to read:

(c) Except as provided in subsection (b) of this section, the county board may either allow or disallow a refund claim which is submitted to it for final review. When the county board disallows *such a discretionary* claim, the claimant may appeal that decision to the county circuit court. If the claimant initiates *such* an appeal, any *county* board, officer, or commissioner who disapproved or disallowed the claim may be made a defendant to the action.

New code section 6-1.1-26-4(d) would read:

(d) *When the State Board of Tax Commissioners disapproves of a refund claim and, consistent with I.C. 6-1.1-26-4, the county board then disallows the refund claim, the claimant may appeal the disallowance to the Indiana Tax Court as a final determination of the State Board of Tax Commissioners. The tax court shall have exclusive jurisdiction over such appeals.*

This proposal would simply codify the Indiana Tax Court's dicta from *Herff Jones*, and thus reinforce the Indiana General Assembly's original goal of uniformity in state tax litigation.

D. *Jurisdiction over Injunctive Relief Petitions When No Original Tax Appeal Is on File*

The final jurisdictional issue came to the forefront during the survey period in the most dramatic fashion. By way of a writ of prohibition,

93. 1988 Tax Survey, *supra* note 74, at 395.

the Indiana Supreme Court held that the Indiana Tax Court lacks jurisdiction over a petition for injunctive relief unless an original tax appeal is on file with the Indiana Tax Court.⁹⁴

1. *The AUL Case.*—The issue arose in a case brought in the Indiana Tax Court: *American United Life Insurance Co. v. Indiana State Board of Tax Commissioners*.⁹⁵ AUL initiated the action by filing a petition for injunctive relief with the Indiana Tax Court. However, no original tax appeal was filed. Indeed, no such appeal could have been filed because there was not a final determination from the Board.

In its petition, AUL claimed that it had been wrongfully denied a portion of the property tax replacement credit under the property tax replacement fund provisions of Indiana Code sections 6-1.1-21-1 to -4.⁹⁶ The dispute arose out of tax increment financing for the Circle Center Mall in Indianapolis, with AUL basically claiming that its property was being taxed at a different effective rate of taxation than other property within the same taxing district.

AUL had filed claims for refunds for tax years 1987 through 1989, but no final determination had been issued by the Board as late as October of 1990. In order to enjoin collection of the November 1990 installment representing the disputed amount of the credit, AUL sought injunctive relief from the Indiana Tax Court. The defendants moved to dismiss the petition, arguing that under the Indiana Tax Court's enabling statute, an original tax appeal is a prerequisite to seeking injunctive relief. The defendants also asserted that an original tax appeal could never find its way to the Indiana Tax Court in this setting because any appeal would lie with a county circuit court.

Judge Fisher denied the motion to dismiss by memorandum order, reasoning that an original tax appeal could result under the posture of the case, and that such an appeal need not be on file.⁹⁷ Indeed, Judge Fisher previously had written in *American Trucking Associations, Inc. v. State*⁹⁸ that the Indiana Tax Court is empowered to enjoin the collection of taxes even before "an original tax appeal [is] filed or [is] ripe for filing at the time the injunction is requested."⁹⁹

94. *State ex. rel. Consol. City of Indianapolis v. Indiana Tax Court*, No. 49500-9010-OR-689 (Ind. Nov. 1, 1990).

95. *American United Life Ins. Co. v. Indiana State Board of Tax Comm'rs*, No. 49T05-9008-TA-40, slip op. (Ind. T.C. Oct. 29, 1990).

96. IND. CODE §§ 6-1.1-21-1 to -4 (Supp. 1990).

97. *AUL*, No. 49T05-9008-TA-40, slip op. at 2-3.

98. 512 N.E.2d 920 (Ind. T.C. 1987).

99. *Id.* at 922. Judge Fisher further wrote in *American Trucking* that "it is not necessary to determine here how much, if any, time may elapse after an injunction is granted before the original tax appeal must be filed, or be ripe for filing. Such determination is left for the future." *Id.*

Judge Fisher then set the *AUL* matter down for an expeditious trial, as is required by Indiana Tax Court Rule 12(F).¹⁰⁰ Before trial could be had, however, the defendants sought a writ of prohibition from the Indiana Supreme Court.¹⁰¹ Argument was heard the week after the petition for a writ was filed, and shortly after the argument was concluded, the Justices returned to announce their decision, as is contemplated by Original Action Rule 4(E).¹⁰² By a 3-2 vote, with Justices Givan and Pivarnik dissenting, the Indiana Supreme Court granted the writ and held that the Indiana Tax Court lacked jurisdiction.¹⁰³

The court supported its decision with two alternative rationales. In announcing the decision, Chief Justice Shepard stated that either the *American Trucking* decision was wrongly decided or there is no possibility of an original tax appeal ever reaching the Indiana Tax Court in the peculiar posture of *AUL*.¹⁰⁴

The first reason given by the Indiana Supreme Court is of greatest importance to this discussion.¹⁰⁵ In overruling the *American Trucking*

100. Tax Court Rule 12(F) provides that when a "petition to enjoin the collection of a tax pending the original tax appeal is filed pursuant to I.C. 33-3-5-11(b), a hearing will be held as promptly as possible upon request of either party." IND. TAX CT. R. 12(F).

101. *State ex. rel. Consol. City of Indianapolis v. Indiana Tax Court*, No. 49S00-9010-OR-689 (Ind. Nov. 1, 1990).

102. Original actions such as that brought by the defendants in *AUL* are governed by the Rules of Procedure for Original Actions. These rules contemplate an expedited, somewhat informal procedure, and Rule 4(E) provides that upon completion of the oral arguments, the court will deliberate and then return to announce its decision orally. IND. R. P. ORIGINAL ACTIONS 4(E).

103. *State ex. rel. Consol. City of Indianapolis*, No. 49S00-9010-OR-689.

104. *Id.*

105. This is not to say that the second reason given is not significant. The case was in a curious posture because the code provisions dealing with the property tax replacement fund contain their own procedures for filing claims for refunds in § 6-1.1-21-7. IND. CODE § 6-1.1-21-7 (1988). Under subsection (c) of this provision, the State Board of Accounts is required to establish "an appropriate procedure to simplify and expedite the method for claiming these refunds and for the payments thereof . . . , which procedure is the exclusive procedure for the processing of the refunds." *Id.* § 6-1.1-21-7(c). Unfortunately, the State Board of Accounts has never established such procedures, so the "exclusive" procedure is nonexistent.

Because of this problem, *AUL* filed its claim for refunds under both § 6-1.1-21-7 and the general refund provisions of § 6-1.1-26-4. *See id.* §§ 6-1.1-21-7, -26-4. Recall that the latter provisions speak of an appeal to the county circuit courts, although the tax court wrote in *Herff Jones* that, when the county board has no discretion to allow a claim that has been disapproved by the Board, the tax court has jurisdiction. *Herff Jones, Inc. v. State Board of Tax Comm'rs*, 512 N.E.2d 485, 491 (Ind. T.C. 1987); IND. CODE § 6-1.1-26-4.

In this light it is seen that the Indiana Supreme Court's decision could have profound

decision, the Indiana Supreme Court followed the letter of the Indiana Tax Court's enabling statute and in so doing curtailed the availability of injunctive relief in the Indiana Tax Court.¹⁰⁶ The Indiana Tax Court's statute provides that "[a] taxpayer who wishes to enjoin the collection of a tax pending the original tax appeal must file a petition with the tax court to enjoin the collection of the tax."¹⁰⁷ This section in conjunction with section 33-3-5-11(c) further reads:

The petition must set forth a summary of:

(1) the issues that the petitioner will raise in the original tax appeal; and

(2) the equitable considerations for which the tax court should order the collection of the tax to be enjoined.

(c) After a hearing on the petition filed under subsection (b), the tax court may enjoin the collection of the tax pending the original tax appeal, if the tax court finds that:

(1) the issues raised by the original tax appeal are substantial;

(2) the petitioner has a reasonable opportunity to prevail in the original tax appeal; and

(3) the equitable considerations favoring the enjoining of the collection of the tax outweigh the state's interests in collecting the tax pending the original tax appeal.¹⁰⁸

In *American Trucking*,¹⁰⁹ Judge Fisher relied on the language of section 33-3-5-11(b)(1) which states that the petition for injunctive relief must set forth the issues that "[the petitioner] *will raise* in the original tax appeal."¹¹⁰ Based on this forward-looking language, Judge Fisher reasoned that an original tax appeal need not be on file for injunctive relief to be granted.¹¹¹

Indeed, a contrary construction would render the injunctive relief provision "fundamentally flawed."¹¹² As one author explained:

First, [the injunctive relief provision] simply disregards the fact that the tax court does not have jurisdiction to hear an appeal

effects on the tax court's *dicta* in *Herff Jones*. 512 N.E.2d at 490-91. Thus, it is possible after *AUL* that the tax court's jurisdiction over Board determinations of property tax refund claims is in grave doubt. *American United Life Ins. Co. v. Indiana State Board of Tax Comm'rs*, No. 49T05-9008-TA-40, slip op. (Ind. T.C. Oct. 29, 1990). This is all the more reason for adoption of legislative corrections of the type proposed in this Article.

106. *State ex. rel. Consol. City of Indianapolis*, No. 49500-9010-OR-689.

107. IND. CODE § 33-3-5-11(b) (1988).

108. *Id.* § 33-3-5-11(b)(1), (b)(2), (c).

109. 512 N.E.2d 920 (Ind. T.C. 1987).

110. *Id.* at 922 (emphasis added); IND. CODE § 33-3-5-11(b)(1) (emphasis added).

111. *American Trucking*, 512 N.E.2d at 922.

112. 1987 *Tax Survey*, *supra* note 12, at 375.

unless the taxpayer has complied with all of the statutory requirements for the initiation of the tax appeal. In the case of appeals from the revenue department, the taxpayer is statutorily required first to pay the challenged tax, then to file a claim for refund; the statutory appeal lies from the department's denial of the refund claim. If the taxpayer cannot initiate his appeal without first paying the contested tax, the stark question is: what purpose is served by the injunction procedure?

....

Another fundamental inconsistency with the new tax collection injunction provision is that it is unnecessary in the case of a taxpayer appeal challenging property tax assessment increases by the state tax board. Under Indiana Code section 6-1.1-15-10, property tax taxpayers are basically relieved from paying tax on contested assessment increases during the pendency of a court appeal challenging such increases.¹¹³

In *AUL*, the taxpayer was in a similar situation to that discussed above regarding claims for refund with the Department, because *AUL*'s right to file an original tax appeal, if at all, depended upon a final determination by the Board.¹¹⁴

Nonetheless, the statute contains contrary language indicating that the legislature intended original tax appeals to be on file before injunctive relief can be obtained. For instance, section 33-3-5-11(c) states that the Indiana Tax Court may enjoin the collection of tax "*pending the original tax appeal*, if the tax court finds that: (1) the issues *raised by the original tax appeal* are substantial"¹¹⁵ The words "*pending the original tax appeal*"¹¹⁶ strongly suggest that injunctive relief is proper only while the merits of an original tax appeal are ripe.

Indeed, *Black's Law Dictionary* defines "*pending*" to mean "[b]egun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment."¹¹⁷ This authority further provides that "an action or suit is '*pending*' from its inception until the rendition of final judgment."¹¹⁸ Moreover, the first subsection of Indiana Code section 33-3-5-11(c) instructs the Indiana Tax Court to look to the "*issues raised by the original*

113. *Id.* (footnotes omitted).

114. *American United Life Ins. Co. v. Indiana State Board of Tax Comm'rs*, No. 49T05-9008-TA-40, slip op. (Ind. T.C. Oct. 29, 1990).

115. IND. CODE § 33-3-5-11(c) (1988) (emphasis added).

116. *Id.*

117. BLACK'S LAW DICTIONARY 1021 (5th ed. 1979).

118. *Id.*

tax appeal'' in order to rule on the injunctive relief petition.''¹¹⁹

Thus, there is ample support for the Indiana Supreme Court's decision. Although, the Indiana Tax Court has consistently and understandably tried to effect the legislature's goal of uniformity in Indiana tax matters, the enabling statute simply prevents it from exercising jurisdiction over injunctive relief petitions when there is no original tax appeal on file. The Indiana Supreme Court made it clear in *AUL* that injunctive relief may not be obtained unless an original tax appeal is on file.¹²⁰

2. *The Aftermath of AUL*.—After the Indiana Supreme Court's decision in *AUL*, the value of the Indiana Tax Court's injunctive relief provisions is uncertain. Conceivably, the only time these powers can be used is when the Department issues a final determination in the form of a letter of findings under section 6-8.1-5-1(e) and begins collection efforts.¹²¹ This assumes, of course, that a letter of findings constitutes a "final determination" for purposes of appeal to the Indiana Tax Court, an issue which, as discussed previously,¹²² is quite problematic.

Hopefully, the legislature will act quickly to enact amendments similar to those proposed earlier in this Article¹²³ to allow jurisdiction when a listed tax has not been paid. Until such amendments are passed into law, however, the Indiana Tax Court's jurisdiction over appeals from letters of findings is tenuous. Nonetheless, taxpayers should continue to seek injunctive relief in these cases. The Indiana Tax Court has been willing to accept petitions challenging letters of findings, and the Department has not objected to date. Provided that such petitions are accompanied by an original tax appeal as required by *AUL*, injunctive relief is, from a practical standpoint, still available. Without legislative action, however, the jurisdictional foundations of such relief are tenuous at best.

D. Summary of the Jurisdiction of the Indiana Tax Court

The following tables summarize the Indiana Tax Court's basic jurisdiction over Indiana tax issues:

119. IND. CODE § 33-3-5-11(c)(1) (1988).

120. No. 49T05-9008-TA-40, slip op. (Ind. T.C. Oct. 29, 1990).

121. IND. CODE § 6-8.1-5-1(e) (Supp. 1990).

122. See *supra* Section II.B.2.a.-c.

123. See *supra* Section II.B.2.d.

1. APPEALS FROM THE DEPARTMENT OF REVENUE

<u>Tax Involved</u>	<u>Nature of Determination</u>	<u>Authority</u>	<u>Jurisdiction</u>
Listed Taxes	Denials of Refund Claims	6-8.1-9-1(c) 33-3-5-2	Yes
Inheritance Tax	Redeterminations of Inheritance Tax	6-4.1-7-7	Yes
Inheritance and Determinations of Estate Tax	Inheritance or Estate Tax Refunds	6-4.1-10.5	Yes
Estate Tax	Final Determinations of Estate Tax	6-4.1-11-7	Yes
Listed Taxes	Letters of Findings under 6-8.1-5-1	33-3-5-2	Doubtful, but such petitions are routinely accepted ¹²⁴

2. APPEALS FROM THE STATE BOARD OF TAX COMMISSIONERS

<u>Tax Involved</u>	<u>Nature of Determination</u>	<u>Authority</u>	<u>Jurisdiction</u>
Property Taxes	Final Determinations - Assessments	6-1.1-15-5 33-3-5-2	Yes
Property Taxes	Denials of Refund Claims	<i>Herff Jones</i> , 512 N.E.2d 485 (<i>dicta</i>)	Uncertain, but tax court asserts jurisdiction ¹²⁵

3. INJUNCTIVE RELIEF JURISDICTION

<u>Tax Involved</u>	<u>Nature of Determination</u>	<u>Authority</u>	<u>Jurisdiction</u>
Listed tax or Property tax	Denial of Claim for Refund	33-3-5-11	Yes, but tax has already been paid
Property tax	Final Determination - Assessment	33-3-5-11	Yes, but tax increase is effectively stayed
Listed tax	Letter of Findings under 6-8.1-5-1	33-3-5-11	Doubtful, but tax court accepts such petitions
Listed tax or Property tax where no original tax appeal on file	Any type of decision	<i>AUL</i> case (City of Indpls. v. Tax Ct.).	No

124. The legislation proposed in this Article would provide jurisdiction. *See id.*125. *Id.*

III. INDIANA'S PROPERTY TAX SYSTEM UNDER THE MICROSCOPE

Indiana's property tax system is a common topic of debate among practitioners and taxpayers. The discussions were heightened during the survey period.

A. Legislative Mandates for Review of the System

The legislature initiated a review of Indiana property taxation¹²⁶ by establishing a "Reassessment Study Committee"¹²⁷ and a "Real and Personal Property Tax Study Committee."¹²⁸ The Board was also directed to study the property tax system.¹²⁹

The Reassessment Study Committee is a fifteen-person committee composed of four state senators, four state representatives, and seven law members.¹³⁰ The Committee was created in response to concerns stemming from the 1989 reassessment of real property, and the Committee was charged with evaluating a number of important issues.

The Committee held four meetings in 1990 and received testimony from a variety of citizens and public officials. The Committee issued a report summarizing some of the major areas of concern. In its report, the Committee formulated seventeen different recommendations, all of them being somewhat general in nature. For instance, the Committee recommended that the "amount of training provided for local assessing officials should be increased."¹³¹

Other recommendations are more substantive, however. For example, the Committee proposed that the issue of "whether real property should be valued by the replacement method or by the market value method should be resolved in 1991, and a recommendation should be made to the general assembly in 1991."¹³² The Committee also recommended

126. For a review of Indiana's property tax system and the major policy issues surrounding it, see Stroble & d'Avis, *Current Issues Affecting Indiana Tax Policy*, 22 IND. L. REV. 449, 449-67 (1989).

127. Act of Mar. 20, 1990, Pub. L. No. 47-1990, 1990 Ind. Acts 1355.

128. Act of Mar. 20, 1990, Pub. L. No. 179-1990, 1990 Ind. Acts 2224.

129. Act of May 9, 1989, Pub. L. No. 352-1989 (Spec. Sess.), 1989 Ind. Acts 2111.

130. PROPOSED FINAL REPORT OF THE REASSESSMENT STUDY COMMITTEE (on file at the *Indiana Law Review* office) [hereinafter PROPOSED FINAL REPORT].

131. *Id.*

132. *Id.* Unlike other states, Indiana still uses replacement value, as represented by "true tax value," to assess real property. See *Lawsuit Could Kick Props from Under State Tax System*, Indianapolis Star, Nov. 11, 1990, at A-16 ("Indiana is the only state in the nation that doesn't base property tax valuations on market value, or what the property could sell for."). "True tax value does not mean fair market value." IND. CODE § 6-1.1-31-6(c) (1988). *Accord* Cook v. City of Indianapolis, 559 N.E.2d 1201 (Ind. Ct. App. 1990) (court rejects landowner's argument that the assessed value of his land had relevance to the fair market value of his land in an eminent domain proceeding).

procedural changes, such as requiring up to sixty days for taxpayers to appeal their assessments.¹³³

The greatest impact of the Committee will probably be to heighten the Indiana General Assembly's awareness of the need for changes in the system. The Committee's work in identifying problems is a positive step toward improving real property taxation in Indiana.

The Board has also been active in this regard. It is to report its findings before January 1, 1992, and is in the process of conducting a wide ranging study of the entire property tax system. It has prepared a preliminary report that, more than anything, shows the breadth of issues involved and the diversity of opinions on the subject.¹³⁴

Finally, in a somewhat different light, the Real and Personal Property Tax Study Committee was formed to analyze the possibility of eliminating real and personal property taxation entirely, and replacing the lost revenue from other sources. This Committee consists of eight members of the legislature, the Chairman of the State Board of Tax Commissioners, the Commissioner of the Department of Revenue, and the Director of the Budget Agency.

The very creation of these committees is important, for it shows that the legislature is aware of the archaic procedures and results of the current system. The following three categories are the major issues to be addressed: (1) What standard of value should be used for assessing property, that is, should market value be used as in most other states? (2) Who should do the assessing? (3) What is the proper role of the existing exemptions, deductions, and credits, and would they withstand constitutional scrutiny?¹³⁵

Given the scope of these studies, it is doubtful that comprehensive legislation will be enacted soon. Nonetheless, the issues affect nearly every Indiana citizen at least indirectly, and the need for reform is clear. Indiana tax practitioners should follow these developments and assist in the improvement of Indiana property taxation.

B. Review of the System in the Indiana Tax Court

Many court challenges to the property tax system have been filed over the years. However, "such property tax challenges have been settled out of court without addressing constitutional questions."¹³⁶ During the

133. See PROPOSED FINAL REPORT, *supra* note 130.

134. THE INDIANA PROPERTY TAX SYSTEM, PRELIMINARY REPORT OF THE IND. STATE BD. OF TAX COMM'RS (July 23, 1990).

135. See L. STROBLE, 1990 INDIANA STATE TAX DEVELOPMENTS (Indiana Tax Institute, I.C.L.E.F. 1990).

136. *Lawsuit Could Kick Props from Under State Tax System*, Indianapolis Star, Nov. 11, 1990, at A-16.

survey period, however, an action was filed in the Indiana Tax Court in which the constitutional issues could have been addressed.

In *Northern Indiana Public Service Co. v. Indiana State Board of Tax Commissioners*,¹³⁷ NIPSCO asserted a broad-based challenge to Indiana's system of assessing and taxing tangible property. The petition raised four different issues in four counts. First, NIPSCO asserted that the Board erred in denying its request for equalization of its utility distributable property in various counties. Through equalization, NIPSCO sought to lower the assessed value of its distributable property to the general level at which it asserted other real property in the counties was assessed.

In count two, NIPSCO claimed that article X, section 1 of Indiana's Constitution requires assessment based on fair market value. NIPSCO pointed out that other states with similar just value language in their constitutions require fair market value to be used. In count three, NIPSCO asserted discrimination on the grounds that the assessment of agricultural land in Indiana is essentially capped at \$495 an acre. Finally, in count four, NIPSCO claimed that the property tax scheme's provision for "numerous exemptions and deductions" is discriminatory and unconstitutional.

NIPSCO raised serious questions about the constitutionality of Indiana's archaic property tax system. However, as in the past, the case will not break new law in this area because at the time this Article went to press, the parties settled the case.¹³⁸ One of the reasons for the settlement, according to one of the Commissioners of the State Board, was that the Board "really do[es]n't know whether our system would withstand a constitutional challenge."¹³⁹ The Commissioner added, "We would just like to contain (constitutional challenges) as long as possible and work from within to change the system."¹⁴⁰ Such an admission from a member of the Board shows that change is likely to occur in the future, one way or another.

IV. CONCLUSION

Both the Indiana Tax Court's jurisdiction and Indiana's property tax system were subjects of intense debate and litigation during the survey period. Unfortunately, unless the legislature takes action on both matters, the debate could intensify in the future.

137. No. 49T05-9007-TA-34, slip op. (Ind. T.C. July 13, 1990).

138. *3 Utilities Set Lower Assessments in Tax Case*, Indianapolis Star, Feb. 6, 1991, at A-14.

139. *Id.*

140. *Id.*

Statutory Interpretation in State Courts — A Study of Indiana Opinions

WILLIAM D. POPKIN*

I. HISTORICAL BACKGROUND

Prior to 1980, statutory interpretation seemed to be a moribund academic field. The dominant academic approach was established by the Hart & Sacks Legal Process materials,¹ which reconciled the traditional creative power of common law courts with the policy of deference to legislation. The Legal Process “solution” was to presume that statutes were texts with a purpose, that the purpose was what reasonable people would pursue, and that courts, sharing in that reasonable vision, could apply that purpose to resolve uncertainties within statutory gaps. Statutes therefore set the framework within which courts engaged in reasoned elaboration of legislative purpose. This system preserved both legislative supremacy and judicial creativity.

Wide acceptance of the Legal Process solution appeared to end academic debate about statutory interpretation. Except for Reed Dickerson’s efforts to keep the subject alive,² the literature was sparse. That changed in the last decade, and statutory interpretation became a subject of intense academic interest. In retrospect, it appears that the Legal Process solution matured around the time when new legislative tensions were beginning to render its vision of the legislative process obsolete. The romanticized idea of a reasonable legislature whose purpose(s) the court discerns now seems almost quaint after the recent political turmoil over civil rights, income redistribution, budgets, and deregulation. By the 1980s, the literature on statutory interpretation began to catch up with the reality of the legislative process and to put forth new visions of the judicial role.³

Two modern academic movements undermined the Legal Process perspective. The Law and Economics perspective described the legislative process as anything but reasonable and purposive. Instead, it depicted the legislative process as one of bargaining by private interests producing

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1. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958).

2. His basic work is R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* (1975).

3. For a review of the literature, see Frickey & Eskridge, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987).

a document with no underlying purpose except that of limiting the other side's advantage.⁴ This undermined the notion that courts could be creative in elaborating purpose and still be faithful to the statute.⁵

The main rival to the Law and Economics movement is the Law and Literature movement. It also undermined the Legal Process approach, but from a different point of view. While the Law and Economics perspective pulled the judge away from creative elaboration of legislative purpose, the Law and Literature perspective emboldened the judge to interpret statutory texts creatively.⁶ Unlike the Legal Process approach, however, judicial creativity did not fit snugly within the gaps set by historical legislative purpose. Instead a statute was embedded in the broader legal framework, consisting of evolving background norms that were critical to the judge's attribution of statutory meaning.⁷

In this untidy, post-Legal Process world, not everyone shares these perspectives on statutory interpretation. Both the Economics and the Literature perspectives are vulnerable to two contrasting objections. First, as perspectives on *legal* interpretation, they underestimate the power relationships that law privileges, sharing some of the complacency of the Legal Process approach. The feminist critique of statutory interpretation is the most articulate expression of this point of view.⁸

Second, rather than being too complacent about law, "Law and" perspectives pay insufficient attention to the traditional legal values of commitment to the statutory text and legislative intent. The legislative text and historical legislative purpose are realities the interpreter cannot neglect, even though their meaning cannot be perfectly recreated by the judicial reader. An interpretive process that takes these traditional legal values seriously will be different from one that freely indulges interpretive presumptions about private interest legislative bargaining or evolutionary background norms.

Many advocates of "Law and" approaches are coming to recognize the importance of traditional concerns with legislative text and intent.

4. See Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

5. Critiques of the Law and Economics description of the legislative process appear in Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63 (1990). See also Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-[]KENT. L. REV. 123 (1989).

6. A recent review and critique of the Law and Literature movement appear in Weisberg, *The Law-Literature Enterprise*, 1 YALE J. L. & HUM. 1 (1988).

7. See Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

8. See West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 YALE J. L. & HUM. 129 (1988).

For example, in the Law and Economics school, Judge Posner now leans toward the traditional Legal Process view that the judge's task is to imaginatively reconstruct legislative purpose.⁹ And some commentators, who would be sympathetic with the Law and Literature movement, have shied away from its more radical implications, which appear to disregard, or at least minimize, the role of the text and legislative intent. They instead search for ways in which text and intent can constrain the judge without denying a creative judicial role.¹⁰

The tempering of "Law and" perspectives to take account of traditional concerns with text and intent has led to the development of another school of thought based on legal pragmatism and practical reason.¹¹ In this view, no single approach to statutory interpretation is acceptable, whether it is a presumption of private bargaining, evolutionary interpretation, or single-minded commitment to text and intent. The importance of one or another criterion of interpretation varies with the area of law and the statutory text; and, further, depends on what the interpreter learns about statutory meaning from her encounter with the facts of the case.¹²

State court cases have not appeared prominently in the recent literature on statutory interpretation. Three reasons may account for this neglect. First, the arena for politically contentious legislation has shifted to Congress. Law reform, once predominantly the domain of state legislation (as in Workers' Compensation and the Uniform Commercial Code), is now largely dealt with by federal statutes (such as securities law, replacing state fraud law; environmental law, superceding state nuisance law; and civil rights law, supplanting state contract law). Redistribution law is now either addressed by federal statute or by state statutes complying with federal standards (as in tax, welfare, and social insurance law).

Second, scholars interested in state law have traditionally focused on the common law rather than statutory interpretation.¹³ And, third, state judicial opinions appear less self-conscious about interpretive theory than federal opinions, tending instead toward black letter canons

9. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286-93 (1985).

10. See Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353-62 (1990).

11. See Eskridge & Frickey, *supra* note 10; Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988); Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 543 (1988).

12. See generally Eskridge, *Gadamer/Statutory Interpretation*, 90 COLO. L. REV. 609 (1990).

13. A major exception is G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

of construction. This approach appears to leave little room for academic comment, except to repeat the traditional criticism of these canons.¹⁴

The neglect of state statutory interpretation is unfortunate. Two of the issues prominent in contemporary literature can be profitably explored in the context of state cases. First, the reliance on black letter canons in state court decisions is a symptom of an emphasis on the statutory text and legislative intent.¹⁵ If we are experiencing a revival of traditional interest in text and intent in statutory interpretation, state court cases are a good place to consider its advantages and pitfalls. Second, the fact that state court opinions tend to be innocent of interpretive theory makes them fertile ground for observing how judges actually make interpretive choices, including whether they behave in the manner predicted by any of the "Law and" approaches to statutory interpretation.

Part IIA of this Article will explain how Indiana decisions apply traditional concerns for the statutory text and legislative intent. Part IIB will analyze the cases for what they reveal about the process of judicial choice to determine statutory meaning. The primary source material was a Westlaw search of opinions specifying the West Statute Keynote (number 361) during the period from 1980 to July 1990. The prior and later history of each case was also examined. This revealed a potential shortcoming in gathering data because the statute keynote number was not always used by West even though the case involved an interesting interpretive issue.¹⁶

One note of caution is in order before we begin examining Indiana cases. Judicial rhetoric about statutory interpretation is often unhelpful. Responding to the need to speak authoritatively and yet be deferential to the legislature, courts will refer to a litany of interpretive criteria including plain meaning of the text and legislative intent,¹⁷ with little

14. The classic criticism is Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950).

15. There is a cautious revival of interest in the canons. See Eskridge, *supra* note 12, at 662-64; Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 451-54 (1989).

16. The first citation in the following cases does not refer to the statute key number, but the second citation does. *Koske v. Townsend Eng'g Co.*, 551 N.E.2d 437 (Ind. 1990), *rev'g*, 526 N.E.2d 985 (Ind. Ct. App. 1988); *Wallis v. Marshall County Comm'rs*, 531 N.E.2d 1223 (Ind. Ct. App. 1988), *rev'd*, 546 N.E.2d 843 (Ind. 1989); *Community Hosp. v. McKnight*, 482 N.E.2d 280 (Ind. Ct. App. 1985), *rev'd*, 493 N.E.2d 775 (Ind. 1986); *Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170 (Ind. 1983), *rev'g*, 437 N.E.2d 78 (Ind. Ct. App. 1982); *Indiana Dep't of Revenue v. Glendale-Glenbrook Assocs.*, 404 N.E.2d 1178 (Ind. Ct. App. 1980), *rev'd*, 429 N.E.2d 217 (Ind. 1981).

17. See, e.g., *In re Middlefork Watershed Conservancy Dist.*, 508 N.E.2d 574, 577

apparent concern for the complexity of the underlying concepts or whether they have any explanatory power in deciding a case. It is therefore sometimes necessary to separate what the court says from what it does.

In one respect, the rhetoric in Indiana cases is especially misleading. Indiana courts often state that a text with a plain meaning blocks statutory interpretation.¹⁸ The image of a text as a barrier to interpretation fails to capture the practical reasoning process by which judicial readers explicate a text. A text is more accurately viewed, not as a barrier, but as a starting point and as one of many interpretive criteria. The judge makes an initial pass at the relevant text (narrowly defined to be just one or a few words), and, considering the facts, makes a tentative judgment about whether the facts obviously come within the text. Then begins the back and forth process of deciding whether the tentative judgment should prevail. Evidence of legislative intent and a consideration of important background values may place pressure on the initial text-based conclusion. The statutory language is examined again and may be expanded to include more words within the relevant statute and other statutes. If this back and forth process converges to a single meaning, the temptation to say that the meaning is plain and to describe the text as a barrier may be irresistible. But the barrier would be breached in an appropriate case and is, in fact, tentatively breached as the interpretive process unfolds, perhaps unconsciously.¹⁹

(Ind. Ct. App. 1987) (intent; goals, reasons and policy; context; plain meaning of text; presumption against illogical or absurd meaning; etc.); *Alvers v. State*, 489 N.E.2d 83, 89 (Ind. Ct. App. 1986) (statute not viewed in isolation; words given plain meaning; look to subsequent enactments; presumption against illogical or absurd meaning; narrow construction of criminal statute; etc.); *Herbert v. State*, 484 N.E.2d 68, 70 (Ind. Ct. App. 1985) (clear language barrier to interpretation; legislative intent fundamental); *Jones v. Hendricks County Plan Comm'n*, 435 N.E.2d 82, 83-84 (Ind. Ct. App. 1982) (is language uncertain; if so, determine legislative intent; primarily use language; rely on plain, ordinary meaning); *Indiana Alcoholic Beverage Comm'n v. Osco Drug, Inc.*, 431 N.E.2d 823, 833-34 (Ind. Ct. App. 1982) (will not interpret unambiguous language; if ambiguous look at intent, with spirit prevailing over letter of law; legislature presumed aware of existing statutes; statutes interpreted *in pari materia*; specific prevails over general; change of text implies change of meaning; and legislative inaction implies acquiescence).

18. Well over 40 of the 333 opinions examined contained this statement. See, e.g., *Heltzel v. Thomas*, 516 N.E.2d 103, 106 (Ind. Ct. App. 1987) (may not interpret language plain on its face).

19. Occasionally a decision will acknowledge this complexity: "[I]t is not the clarity or ambiguity of the words used in a statute that determine whether judicial construction of the statute is appropriate; rather it is the clarity or ambiguity of *the meaning* those words give to the statute as a whole." *Winona Memorial Found. v. Lomax*, 465 N.E.2d 731, 737 (Ind. Ct. App. 1984) (emphasis in original).

II. CRITERIA FOR STATUTORY INTERPRETATION

A. *The Statutory Text and Legislative Intent*

1. *Conception of the text.*—A court that is determined to rely on the statutory text must still decide what the relevant text is. It can focus narrowly on the plain meaning of a word or two, on the statute as a whole, on the entire body of statute law, or on changes in statutory language over time. This section considers Indiana courts' conception of the statutory text.

a. *Plain meaning, common understanding, and literalism*

Judges often claim to focus on the plain meaning of one or two key words in a statutory text,²⁰ but there is a right and a wrong way to do this. The right way is to identify the audience intended by the legislative author and to determine whether that audience and the statute's likely public audience share a common understanding about what the words mean. When these two meanings converge, there is a common understanding between author and reader, and the text can be said to have a plain meaning.²¹

Another form of "plain meaning" interpretation goes by the pejorative label "literalism." This is the wrong way to go about interpreting texts. The literalist is not really concerned with how an audience understands language but instead disregards what the audience is likely to understand. Indiana courts usually avoid literalism in this sense of the term.²²

Literalism can occur in two ways. First, the court disregards the text's intended and likely audience. This often has the effect of privileging colloquial usage over technical meaning. For example, in *Indiana Department of State Revenue v. Food Marketing Corp.*,²³ the issue was the meaning of "cost of goods sold" for determining the amount deductible in computing taxable gross income. The dissent appealed to the colloquial meaning of the term,²⁴ which, in its view, included not much more than the price paid for the product sold. The majority

20. See, e.g., *Herbert v. State*, 484 N.E.2d 68, 70 (Ind. Ct. App. 1985) ("may" implies discretion).

21. The most common way in which the intended and the likely public audience can differ is when an old statute contains terms whose meaning changes over time.

22. The term "literalism" is not always used to describe the approach to interpretation that I have criticized. Sometimes it is used as a synonym for plain meaning in the sense of common understanding.

23. 403 N.E.2d 1093 (Ind. Ct. App. 1980).

24. *Id.* at 1098 (Staton, J., dissenting).

adopted the more technical accounting meaning that included various indirect overhead costs attributable to the goods purchased for resale.²⁵ The majority's reading made more sense in a tax statute aimed at a technically sophisticated audience,²⁶ and therefore deserves to be characterized as an effort to identify plain meaning in the correct sense of "common understanding."

Second, "literalism" emphasizes the grammar of the text with little regard for how language is actually used and understood. Examples include treating use of the singular or plural as dispositive, assuming that the disjunctive "or" always means an alternative, and according conclusive weight to punctuation. English language writers are not always grammatically precise, and a literal "grammatical" approach may therefore be unfaithful to how meaning is communicated. Realizing this, Indiana courts are reluctant to adopt too grammatical an approach to statutory interpretation.²⁷

b. Statute as a whole

A text-based alternative to focusing on one or two words of a statute is to consider the text of the whole statute, as Indiana courts frequently do.²⁸ The instinct to examine the entire text is well entrenched

25. *Id.* at 1096-97. See also *Foremost Life Ins. Co. v. Dep't of Ins.*, 274 Ind. 182, 186-87, 409 N.E.2d 1092, 1097 (1980), in which the majority appealed to a technical distinction in the industry between insurance and reinsurance to define the statutory language, and determined that "reinsurance" was not "insurance." The dissent relied on a more colloquial meaning of the statutory terminology ("insurance," "insurer," and "insured"), and applied what it considered an ordinary definition of "insured" to include reinsurance contracts, *Id.* at 1098-99 (Stanton, J., dissenting).

26. The majority actually claimed that it was adopting the ordinary rather than the technical meaning of the phrase "cost of goods sold," *Food Mktg. Corp.*, 403 N.E.2d at 1096, but the dissent correctly characterizes the majority opinion as adopting a technical definition. *Id.* at 1098 (Stanton, J., dissenting).

27. *Singular and plural*: see, e.g., *Watkins v. Alvey*, 549 N.E.2d 74, 77 (Ind. Ct. App. 1990) (plural not relied on); *Northwest Ind. Educ. Assoc. v. School City of Hobart*, 503 N.E.2d 920, 922 (Ind. Ct. App. 1987) (singular not relied on).

Disjunctive "or": see, e.g., *Dague v. Piper Aircraft Corp.* 418 N.E.2d 207, 210 (Ind. 1981) (reading "or" as providing for alternatives would defeat obvious legislative intent).

Punctuation: see, e.g., *Hill v. State*, 488 N.E.2d 709, 710 (Ind. 1986) (punctuation not dispositive), *rev'g.* 482 N.E.2d 492, 494 (Ind. Ct. App. 1985) (relying on ordinary meaning of punctuation). *But cf.* *Spears v. State*, 412 N.E.2d 81, 83 (Ind. Ct. App. 1980) (court relied on the literal use of commas to block consideration of legislative intent).

28. See e.g., *Kinder v. Doe*, 540 N.E.2d 111, 114-15 (Ind. Ct. App. 1989) (court looked to all sections dealing with immunity and confidentiality in child abuse reporting situations to determine when identity of a news reporter could be obtained); *Sears & Roebuck & Co. v. Murphy*, 511 N.E.2d 515, 516 n.2 (Ind. Ct. App. 1987) (statute construed so language consistent with other parts of the statute); *Selmeyer v. Southeastern Ind. Vocational*

in some of the traditional canons of construction such as *ejusdem generis* (general words embrace things similar to prior specific references) and *expressio unius est exclusio alterius* (reference to one thing excludes others; or, as Indiana courts often put it, "what is unsaid is as important as what is said").²⁹ Using the *expressio* canon, however, is often as misguided as being literalist, by attributing to an omission from the text the same sanctity that the literalist accords to a single word or "rule" of grammar without regard to what the statute's audience would infer.³⁰ The main objection to the *expressio* canon is that the legislature will often specify a result about facts to which it has paid attention, without prejudging situations about which it is silent. The basic instinct of the Indiana courts to look at the *whole* statute is sound, however, whatever the execution.

c. Other statutes

The frequency with which Indiana courts consider the entire body of statute law to help interpret a particular statute was an unexpected finding, based on prior familiarity with federal cases. It is not known whether the Indiana pattern is typical of other states, but there are two plausible reasons for possible differences between state and federal approaches. First, state law encompasses more subjects than federal law, even though the impact of state law is now politically less dramatic. The potential for several statutes covering the same issue is therefore greater. Second, legislative history in the conventional sense of com-

School, 509 N.E.2d 1150, 1152 (Ind. Ct. App. 1987) (two sections read together to limit applicability of first section); Gary Community Mental Health Center, Inc. v. Indiana Dep't of Pub. Welfare, 507 N.E.2d 1019, 1022 (Ind. Ct. App. 1987) (in light of other provisions requiring "hospital care," the court interpreted statute requiring services to be performed "in a hospital" to mean services provided "by a hospital"); Indiana Tele. Ass'n. v. Public Serv. Comm'n 477 N.E.2d 911, 916-17 (Ind. Ct. App. 1985) (words in one part of statute construed to have same meaning in other parts of the act); Edward Rose of Ind. v. Fountain, 431 N.E.2d 543, 545 (Ind. Ct. App. 1982) (because none of surrounding sections pertaining to notice referred to tenant obligations, statutory notice provision interpreted to apply only to landlords); Suburban Homes Corp. v. Harders, 404 N.E.2d 629, 632 (Ind. Ct. App. 1980) (reference in preceding section to constructed drain indicates that another section does not apply to "natural" watercourse).

29. Health & Hosp. Corp. of Marion County v. Marion County, 470 N.E.2d 1348, 1355, 1356 (Ind. Ct. App. 1984) (reference to *expressio* canon); Metropolitan Dev. Comm'n of Marion County v. Villages, Inc., 464 N.E.2d 367, 369 (Ind. Ct. App. 1984) (what is not said is important; also reference to *expressio* canon); *In re Turrin*, 436 N.E.2d 130, 132 (Ind. Ct. App. 1982) (what statute does not say is important).

30. See, e.g., Seymour Nat'l Bank v. State, 422 N.E.2d 1223, 1227 (Ind. 1981) (exception for false arrest and imprisonment implies no other exceptions); Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983) (exclusion of certain employees implies inclusion of university athletes), *rev'd*, 437 N.E.2d 78, 84 (Ind. Ct. App. 1982).

mittee reports is often unavailable at the state level, and clues to statutory meaning must be found elsewhere, such as in the texts of other statutes.³¹

There are several ways in which multiple statutes are considered by Indiana courts. First, similar language in statutes with a common purpose (statutes *in pari materia*) is interpreted in the same way.³² It is also a short step from inferring that the use of the same language in different statutes implies a common result to assuming that different language implies different results. Although the court will make that assumption in many cases,³³ mechanical application of this approach

31. Testimony of the legislative drafter occasionally substitutes for traditional legislative history. See *Irmscher v. McCue*, 504 N.E.2d 1034, 1037 (Ind. Ct. App. 1987) (testimony by one of statute's drafters); *Indiana Dep't of Revenue, Ind. Gross Income Tax Div. v. Glendale-Glenbrook Assoc.*, 429 N.E.2d 217, 219 n.1 (1981) (testimony by state legislator about statutory purpose). See also *Winona Memorial Found. of Indianapolis v. Lomax*, 465 N.E.2d 731, 739-40 n.7 (court cited law review articles written by drafters who lobbied for medical practitioners in support of a position contrary to their interest).

Another form of legislative history is the change in text as the statute works its way through the bill drafting process. See *Gallagher v. Marion County Victim Advocate Program, Inc.*, 401 N.E.2d 1362, 1365-66 (Ind. Ct. App. 1980) and *id.* at 1370-71 (Chipman, J., dissenting) (both majority and dissent relied on changes made during the drafting process, but they disagreed about their significance).

32. *In re Paternity of Joe*, 486 N.E.2d 1052, 1055 n.1 (Ind. Ct. App. 1985) ("best interests of child" given same meaning in contexts of visitation and child custody under paternity and divorce statutes); *Beasley v. Kwatnez*, 445 N.E.2d 1028, 1031 (Ind. Ct. App. 1983) ("vending machine" given same definition in property tax and gross retail sales tax laws); *Barr v. Sun Exploration Co., Inc.*, 436 N.E.2d 821, 825 (Ind. 1982) ("operation for oil and gas" given same meaning in two statutes). Cf. *Tobias v. Violent Crime Compensation Div.*, 470 N.E.2d 105, 108 (Ind. Ct. App. 1984) (pecuniary loss concept, developed by cases under workers' compensation, has same meaning when in Victims Compensation Act).

Common law and statutory rules may also be harmonized. See *DeHart v. State*, 471 N.E.2d 312, 315 (Ind. Ct. App. 1984) (statutory violation inferred on basis of analogy to common law nuisance law).

State statutes may be given the same meaning as similar federal statutes. *Alvers v. State*, 489 N.E.2d 83, 87-89 (Ind. Ct. App. 1986) (Indiana's anti-racketeering statute and federal RICO statute); *United Steelworkers of Am., AFL-CIO-CLC v. Northern Ind. Pub. Serv. Co.*, 436 N.E.2d 826, 829 n.2 (Ind. Ct. App. 1982) (Indiana's Anti-Injunction Act and federal Norris LaGuardia Act); *In re CTS Corp.*, 428 N.E.2d 794, 798-99 (Ind. Ct. App. 1981) (Indiana's Business Take-Over Act and federal Williams Act); *In re City Investing Co.*, 411 N.E.2d 420, 427 (Ind. Ct. App. 1980) (same); *Indiana Dep't of State Revenue, Inheritance Tax Div. v. Estate of Wallace*, 408 N.E.2d 150, 157 (Ind. Ct. App. 1980) (Indiana and federal estate tax law). But see *Flynn v. Klineman*, 403 N.E.2d 1117, 1122 (Ind. Ct. App. 1980) (state and federal securities law interpreted differently).

33. See *Blood v. Poindexter*, 534 N.E.2d 768, 771 (Ind. T.C. 1989) (language of Trust Code and Probate Code varies); *Minton v. State*, 400 N.E.2d 1177, 1179 (Ind. Ct. App. 1980) (language of two criminal statutes differs with reference to inclusion of guilty pleas). Cf. *Lake County Beverage Co. v. 21st Amendment, Inc.*, 441 N.E.2d 1008, 1012-13 (Ind. Ct. App. 1982) (language and interpretation of Indiana statute and federal Robinson-Patman Act differ).

is as misguided as mechanical application of the *expressio* canon. Language differences are not routinely indicative of differences in meaning. For example, language may be added to clarify one statute,³⁴ not to differentiate its meaning from another statute. The court may even be justified in incorporating the approach indicated by the text of one statute into another law, despite language differences.³⁵

Second, two statutes that deal with same subject must be harmonized (also sometimes referred to as statutes *in pari materia*).³⁶ The canon that specific statutes prevail over general statutes is usually applied without controversy,³⁷ implementing the idea that the text that is more focused on the facts of the case should prevail. The specific prevails even when the general statute is the later-passed law,³⁸ despite the

34. See *Lincoln Nat'l Bank v. Review Bd. of Ind. Employment Sec. Div.*, 446 N.E.2d 1337, 1339-40 (Ind. Ct. App. 1983) (language was added to a statute to affirm an interpretation reached in a case; the interpreted language also appeared unamended in another statute, which the court interpreted in the same way, even though it had not been amended).

35. *Holland v. King*, 500 N.E.2d 1229, 1235-37 (Ind. Ct. App. 1986) (statute omits reference to "last known address," which appears in another statute; the court concluded that both statutes require mailing to last known address).

36. *Hines v. Behrens*, 421 N.E.2d 1155, 1159 (Ind. Ct. App. 1981) (stay of execution statute and foreclosure statute); *In re Lemond*, 413 Ind. 228, 245-46, 413 N.E.2d 228, 245-46 n.15 (1980) (Uniform Child Custody Jurisdiction Act and Child in Need of Services Act).

37. See, e.g., *Wayne Township of Allen County v. Hunnicutt*, 549 N.E.2d 1051, 1053 (Ind. Ct. App. 1990); *Ferguson v. Modern Farm Sys. Inc.*, 555 N.E.2d 1379, 1383-84 (Ind. Ct. App. 1990); *Southwest Forest Indus., Dunlap Div. v. Firth*, 435 N.E.2d 295, 297 (Ind. Ct. App. 1982); *In re Waltz' Estate*, 408 N.E.2d 558, 560-61 (Ind. Ct. App. 1980).

When a general statute prevails over a specific statute, there is usually a sound textual basis. See, e.g., *K-mart Corp. v. Novak*, 521 N.E.2d 1346, 1350-51 (Ind. Ct. App. 1988) (Violent Crimes Compensation Act cross references Workers' Compensation statute, implying that more specific Crimes Act did not supercede Workers' Compensation law); *Citizens Action Coalition of Ind., Inc. v. Public Serv. Comm'n of Ind.*, 425 N.E.2d 178, 184-85 (Ind. Ct. App. 1981) (general statute prevails because it contains a provision that it applies unless "expressly provided by statute"). See also *State ex rel. Indiana Life & Health Ins. Guar. Assoc. v. Superior Court of Marion County, Room No. 7*, 272 Ind. 421, 426-27, 399 N.E.2d 356, 359 (Ind. 1980) (prior enabling act granting jurisdiction to the superior court survives passage of later special proceeding act requiring certain claims to be filed in the circuit court, when prior law expressly provides for concurrent and co-extensive jurisdiction within the circuit court).

It is usually easy to tell which is the more specific statute. *But see Gilbert v. State*, 411 N.E.2d 155, 157 (Ind. Ct. App. 1980) ("private road" more specific than "not a part of a through highway," on the ground that latter phrase might include more than a private roadway).

38. *Johnson v. LaPorte Bank & Trust Comm'rs*, 470 N.E.2d 350, 355 (Ind. Ct. App. 1984); *County Council of Bartholomew County v. Department of Pub. Welfare of Bartholomew County*, 400 N.E.2d 1187, 1191 (Ind. Ct. App. 1980).

Often the opinion is silent as to which statute is earlier. See *Sanders v. State*, 466 N.E.2d 424, 428 (Ind. 1984); *Bell v. Bingham*, 484 N.E.2d 624, 627-28 (Ind. Ct. App. 1985);

presumption that a later statute usually takes priority in cases of conflict over an earlier law.³⁹

In other instances, several statutes may deal with the same general area of law but there is no more specific text to prevail over the more general language of another law. The court, in such cases, must work out a sensible pattern to harmonize the statutes.⁴⁰

A number of theories might explain the courts' purpose in consulting several statutory texts to interpret one of them.⁴¹ One theory is that examining several statutes implements legislative intent because the drafter is likely to have the entire body of law in mind when writing statutes.⁴² This cannot, however, explain all of the cases in which multiple statutory texts are considered. The refusal to allow a general statute to take precedence over a specific law rests on the assumption that the legislative drafter did *not* focus carefully on the specific statute, but that the legislature would have wanted the specific law to survive if it had paid attention. Moreover, when later law influences the meaning of *prior* law,⁴³ the court is not likely to be making a genuine inference about what an omnipotent legislative drafter intended.

Hoage v. State, 479 N.E.2d 1362, 1363-64 (Ind. Ct. App. 1985); State v. Souder, 444 N.E.2d 891, 893 (Ind. Ct. App. 1983); Sexton v. Johnson Suburban Utils., 422 N.E.2d 1293, 1296 (Ind. Ct. App. 1981); Wagner v. Kendall, 413 N.E.2d 302, 304-305 (Ind. Ct. App. 1980).

39. Blood v. Poindexter, 524 N.E.2d 824, 825 (Ind. T.C. 1988).

40. See, e.g., McClaskey v. Bumb & Mueller Farms, Inc., 547 N.E.2d 302, 304 (Ind. Ct. App. 1989) (Marketable Title Act relieves the covenants imposed by a warranty deed only to the extent that a claim is extinguished by the Act, thereby harmonizing the Act with another statute governing warranties of title); State v. Magnuson, 488 N.E.2d 743, 751 (Ind. Ct. App. 1986) (Department of Safety and Police Department statutes dealing with statistics gathering were harmonized by concluding that earlier statute imposing obligation to gather statistics was not impliedly repealed by later law dealing with same general subject); Wright v. Gettinger, 428 N.E.2d 1212, 1219-20 (1981) (voting procedure statutes harmonized to determine that prior law requiring clerk to sign ballots survives in part after passage of Electronic Voting System Act); County Council of Monroe County v. State *ex rel.* Monroe County Bd. of Pub. Welfare, 402 N.E.2d 1285, 1288-91 (Ind. Ct. App. 1980) (agency powers harmonized under State Personnel Act, Welfare Act of 1936, and county council statutes).

41. This discussion may also apply to language in the same statute, if the drafter does not consider carefully how the portions of the text interact. Moreover, if different parts of the same statute are not passed during the same session, the text resembles two statutes passed at different times. See, e.g., Indiana Tel. Assoc. Inc. v. Public Serv. Comm'n, 477 N.E.2d 911, 914 (Ind. Ct. App. 1985) (parts of the Public Service Commission Act passed in 1913 and 1951).

42. Indiana cases incorporate this idea when the courts state that the legislature is presumed to be aware of prior law. See Wayne Township of Allen County v. Hunnicutt, 549 N.E.2d 1051, 1054 (Ind. Ct. App. 1990); Blood v. Poindexter, 534 N.E.2d 768, 771 (Ind. T.C. 1989).

43. See, e.g., Gallagher v. Marion County Victim Advocate Program, Inc., 401 N.E.2d 1362, 1368 (Ind. Ct. App. 1980) (the language "required . . . by any rule or regulation of

A second theory explaining why courts examine the entire body of statute law is that sophisticated readers will consider this body of law when deciphering the meaning of any one statute. However, this explanation also seems farfetched because it rests on the possibly unwarranted assumption that the text is being read by very sophisticated readers.

Much as courts dislike admitting it, judicial reliance on the text of multiple statutes may not implement legislative intent *or* the understanding reached by sophisticated readers. Instead, examining multiple statutes may achieve a number of institutional goals, such as forcing the legislature to pay closer attention to what it writes, encouraging lawyers to read the entire body of statute law, and discouraging judges from excessively creative speculation about legislative purpose. Finally, the examination of multiple statutes may simply be a judicial method for dealing with an absence of legislative history to provide concrete evidence of legislative intent.

d. Change in statute over time

Indiana courts also rely on the relationship between several statutory texts when there is a change in statutory language over time. They often presume that a change in language implies a change in meaning⁴⁴

any administrative body or agency" contained in a 1953 statute was read in light of a 1969 statute specifying how an agency makes rules). The dissent questioned how a later law could be used to interpret a prior statute. *Id.* at 1369 n.1 (Chipman, J., dissenting).

44. *Relevant events in cases arose after passage of the second statute:* Wallis v. Marshall County Comm'r, 546 N.E.2d 843, 844 (Ind. 1989); Bonge v. Risinger, 511 N.E.2d 1082, 1084 (Ind. Ct. App. 1987); Second Nat'l Bank of Danville v. Massey-Ferguson Credit Corp., 478 N.E.2d 916, 918 (Ind. Ct. App. 1985); Metropolitan School Dist. of Martinsville v. Mason, 451 N.E.2d 349, 352 (Ind. Ct. App. 1983); Ware v. State, 441 N.E.2d 20, 22-23 (Ind. Ct. App. 1982); Aeronautics Comm'n of Ind. v. State *ex rel.* Emmis Broadcasting Corp., 440 N.E.2d 700, 709 (Ind. Ct. App. 1982); Landers v. Pickering, 427 N.E.2d 716, 718 (Ind. Ct. App. 1981); Froberg v. Northern Ind. Constr. Inc., 416 N.E.2d 451, 453-54 (Ind. Ct. App. 1981); Indiana Dep't of State Revenue, Inheritance Tax Div. v. Lees, 418 N.E.2d 226, 228 (Ind. Ct. App. 1980).

Relevant events in cases probably arose after passage of the second statute: Lake County Beverage Co., v. 21st Amendment, Inc., 441 N.E.2d 1008, 1011 (Ind. Ct. App. 1982); Tarver v. Dix, 421 N.E.2d 693, 698 (Ind. Ct. App. 1981); *In re Wisely's Estate*, 402 N.E.2d 14, 16 (Ind. Ct. App. 1980).

Relevant events in cases arose before passage of the second statute: State v. Page, 472 N.E.2d 1271, 1273 (Ind. Ct. App. 1985); Wright v. Fowler, 459 N.E.2d 386, 389-90 (Ind. Ct. App. 1984); Pierce Governor Co. v. Review Bd. of Ind. Employment Sec. Div., 426 N.E.2d 700, 702-03 (Ind. Ct. App. 1981); Van Orman v. State, 416 N.E.2d 1301, 1305 (Ind. Ct. App. 1981).

unless the better explanation for the change is an attempt to clarify the law.⁴⁵ Perhaps the inference that legislative drafters have prior statutes in mind is more plausible when statutory texts are changed than in other cases in which statutory texts are interpreted as part of an integrated body of law.

When changes in later law are used to infer the meaning of *prior* law, as happened in a number of the cases cited above,⁴⁶ two problems arise. First, the intent of a later legislature is often very doubtful evidence of what the legislature adopting the prior statute meant.⁴⁷ The influence of later law on the meaning of a prior statute is therefore an example of retroactive legislation, which runs counter to the usual presumption against retroactive statutes.⁴⁸ Second, the retroactive impact may be unfair if the events are governed by the earlier statute and arise prior to passage of the second statute. There is no way the affected parties can draw inferences about the meaning of prior law from statutes not passed when the events occur.⁴⁹

This is not to suggest that the use of a later statutory text to influence the meaning of prior law is necessarily wrong. Retroactive texts are very familiar when they occur in the form of common law opinions. Perhaps the use of later statutes to interpret prior law is an

45. The relevant events in the following cases arose *before* passage of the clarifying statute. *Watkins v. Alvey*, 549 N.E.2d 74, 77 (Ind. Ct. App. 1990) (statute explicitly states it is a clarification); *Alvers v. State*, 489 N.E.2d 83, 88-89 (Ind. Ct. App. 1986); *Pike County v. State*, 469 N.E.2d 1188, 1194 (Ind. Ct. App. 1984) (some events before and some after second statute); *Indiana State Highway Comm'n v. Bates & Rogers Constr., Inc.*, 448 N.E.2d 321, 325 (Ind. Ct. App. 1983); *Marsym Dev. Corp. v. Winchester Economic Dev. Comm'r*, 447 N.E.2d 1138, 1144 (Ind. Ct. App. 1983); *H.W.K. v. M.A.G.*, 426 N.E.2d 129, 134 (Ind. Ct. App. 1981).

46. See *supra* notes 44-45.

47. See *Wechter v. Indiana Dep't of State Revenue*, 544 N.E.2d 221, 223 (Ind. T.C. 1989) *aff'd*, 553 N.E.2d 844 (1990) (later law bad evidence of original intent); *Bailey v. Menzie*, 505 N.E.2d 126, 128 (Ind. Ct. App. 1987) (intent of a later legislature is unreliable evidence of intent of legislature that passed earlier statute). See also *Hobbs v. State*, 451 N.E.2d 356, 359 (Ind. Ct. App. 1983) (the court rejected a statement in a preamble about the meaning of prior law). When the second law is passed during the same legislative session, however, the second statute may reflect the intent of those enacting the prior law. Cf. *H.W.K. v. M.A.G.*, 426 N.E.2d 129, 134 (Ind. Ct. App. 1981) (the fact that a change occurred within five months of original passage supports the view that the second law was a clarification).

48. See Appendix § V.

49. The retroactive impact of a later statute is not unfair if the events precede the effective date of the later law but follow the passage of the statute. This occurred in *American Underwriters Group, Inc. v. Williamson*, 496 N.E.2d 807, 809 n.3 (Ind. Ct. App. 1986); *State Farm Fire & Casualty Co. v. Strutco Div., King Seeley Thermos Co.*, 540 N.E.2d 597, 597-98 (Ind. 1989), *rev'g*, 530 N.E.2d 116, 119 (Ind. Ct. App. 1988) (treating addition of language as change in law). As long as the events follow passage, there is notice of the later statute on which the parties can rely.

unacknowledged example of the assimilation of statute law to a pattern of lawmaking long familiar in the common law.

e. Summary

In sum, Indiana cases are rarely literalist in their approach to the statutory text: quite the opposite. They are committed to a broad definition of the text, often placing great weight on the use of language in other statutes and in earlier and later versions of the same statute. Defining the text broadly may not, however, serve the public reliance values that are usually associated with judicial deference to the text. Courts may instead be looking at the entire body of statutory law to force legislatures and lawyers to think of statutes as an integrated body of law, in much the same way that the common law has traditionally been viewed as a seamless web.

2. Conflict Between Text and Intent.—

a. Defining the problem

The concept of legislative intent is as complex as the concept of a "text."⁵⁰ One meaning of "intent" is the broad concept of legislative purpose, such as "favoring social insurance claimants." Those who object to creative judicial elaboration of legislative intent usually have this concept in mind because judicial speculation about purpose may exaggerate one of several purposes (often one side of a legislative bargain) or underestimate the extent to which an overbroad statute was purposely adopted.⁵¹ The better definition of legislative intent, and the

50. The values supported by deference to legislative intent are not the same as those served by deference to the text. Adherence to a fairly narrow definition of the text (excluding other statutes, for example) will usually preserve reliance interests by adhering to the most straightforward reading of the text, reduce discretion in interpreting the law, and preserve the integrity of political language. Adherence to legislative intent (assuming it can be identified with some confidence) implements legislative supremacy. When the evidence of the text's meaning and legislative intent points to the same result, as they often do, there is no tension between these two criteria. But tensions between the meaning of the text and legislative intent sometimes appear and must be resolved.

These generalizations about the effect of relying on text and intent require some qualification. If the text is given an expansive definition, its meaning becomes less certain, undermining the ability of deference to the text to protect reliance interests and discourage interpretive creativity. It is often asserted that judicial speculation about legislative intent is a common means by which interpreters exercise discretion, as observations about actual intent shade off into plausible intent and, finally, into speculation that the legislature would pursue good policy. But sticking to the text may also give rein to interpretive discretion when a choice must be made between narrower and broader definitions of the relevant text.

51. See, e.g., *M & K Corp. v. Farmers State Bank*, 496 N.E.2d 111, 112-13 (Ind. Ct. App. 1986) (statute conclusively presumes that the risk of loss for employee forgery rests on employer and does not allow proof that a negligent bank was better able to prevent loss in a particular case).

one we will be concerned with here, is specific intent in the sense that the legislature would have wanted a particular result on the facts of the case.

A judge often has difficulty guessing what the legislature's specific intent would be. Translating general purpose into specific intent is often very difficult. Background values such as the presumption that statutes are not in derogation of the common law and the liberal interpretation of social legislation are not sufficiently persuasive in most cases to be confidently equated with legislative intent.⁵² Nonetheless, an honest attempt to identify legislative intent will sometimes produce the conviction that intent and text conflict, requiring a judicial resolution. When such a conflict occurs, judicial rhetoric is available to permit trumping the text with intent. Thus, an absurd interpretation of the text is to be avoided and absurdity is often determined by reference to presumed legislative intent.⁵³ The court can also invoke background values in support of legislative intent, even in the weak form of preserving "public convenience."⁵⁴

b. Specific legislative intent

Two Indiana cases in which specific legislative intent clearly trumped the text involve tax issues. In both, the Indiana Supreme Court reversed the lower court's adherence to the letter of the law. One decision imposed a tax, counter to the traditional pro-taxpayer presumption, and the other permitted an exemption in contradiction of the presumption against tax exemptions.⁵⁵ In *Park 100 Development Co. v. Indiana Department of State Revenue*,⁵⁶ the court considered a statute taxing partnerships with a corporate partner. The intent of the statute was to prevent corporate taxpayers from avoiding the corporate tax by forming partnerships. The state tried to tax a partnership with three

52. Other problems with determining specific legislative intent include determining how evolutionary the author's intent might be, regardless of the document's historically contingent context, and deciding whose intent counts (the intent of a legislative committee, for example).

53. *Hill v. State*, 488 N.E.2d 709, 710 (Ind. 1986) (absurd to read statute as allowing exempt retail sales of fireworks, given legislative intent). *See also* *U.S. Steel Corp. v. Northern Ind. Pub. Serv., Inc.*, 486 N.E.2d 1082, 1084 (Ind. Ct. App. 1985) (literal reading of "public utility" rejected because it would include homeowner engaged in backyard gardening in the definition); *Vickery v. City of Carmel*, 424 N.E.2d 147, 149-50 (Ind. Ct. App. 1981) (court corrects textual anomaly that would exempt property outside city from eminent domain procedure applicable to property in city).

54. *See, e.g., State ex rel. Stream Pollution Control Bd. v. Town of Wolcott*, 433 N.E.2d 62, 65 (Ind. Ct. App. 1982) (prevent absurdity and hardship and favor public convenience); *Sidell v. Review Bd. of Ind. Employment Sec. Div.*, 428 N.E.2d 281, 284 (Ind. Ct. App. 1981); *Walton v. State*, 398 N.E.2d 667, 671 (Ind. 1980) (same).

55. *See* Appendix § IV.

56. 429 N.E.2d 220 (Ind. 1981), *rev'g*, 388 N.E.2d 293 (Ind. Ct. App. 1979).

partners, one of which was a partnership that itself had a corporate partner. The corporate partner was attempting to avoid the statute by interposing a partnership between it and another partnership. The court of appeals applied the letter of the law, permitting the use of the intervening partnership to avoid tax. The supreme court applied statutory intent to impose tax.⁵⁷

*Indiana Department of Revenue, Indiana Gross Income Tax Division v. Glendale-Glenbrook Associates*⁵⁸ dealt with the same statute taxing partnerships with a corporate partner. The facts of the case, however, involved an otherwise exempt corporation (an insurance company) that was a partner. The supreme court upheld the exemption, overruling the lower court's decision to impose tax by relying on the statutory text.⁵⁹

Another case of intent trumping text runs counter to an even more hallowed presumption — the narrow construction of criminal law. In *Hill v. State*,⁶⁰ a semicolon in the wrong place made the text appear to permit retail sales of fireworks if a retail buyer affirmed his intent to ship the fireworks out of state. The court, however, invoked legislative intent to permit only wholesale sales, reversing the lower court's decision that the criminal accused was entitled to the letter of the law.⁶¹

c. Background values

Another way a court can prefer legislative intent over the text is by appealing to background values in the light in which the legislature is presumed to have acted. Statutory interpretation cases abound with such substantive presumptions, such as: narrowly interpreting statutes in derogation of the common law, and its antidote, the liberal interpretation of welfare statutes; strict interpretation of criminal law; nar-

57. *Id.* at 222-23. Another case in which the taxpayer was denied the benefit of plain meaning is *Indiana State Bd. of Tax Comm'rs v. Ropp*, 446 N.E.2d 20, 25 (Ind. Ct. App. 1983) (notice of hearing amounted to substantial compliance with statutory requirements because any error did not prejudice the taxpayers).

58. 429 N.E.2d 217 (Ind. 1981), *rev'g*, 404 N.E.2d 1178 (Ind. Ct. App. 1980).

59. *Id.* at 218-19 (the statute clearly intended to close a loophole that the taxpayer was not attempting to exploit).

60. 488 N.E.2d 709, 710 (Ind. 1986), *rev'g*, 482 N.E.2d 492 (Ind. Ct. App. 1985). *See also* *Watkins v. Alvey*, 549 N.E.2d 74, 77 (Ind. Ct. App. 1990) (intent of criminal law prevails over literal construction of statute dealing with pyramid schemes).

61. Effective after this case, the Indiana legislature amended the statute to exempt retail sales if the fireworks were shipped out of state within five days of purchase. Apparently, a written signed statement from the purchaser will protect the seller. IND. CODE ANN. § 22-11-14-4(a)(1)(B), (b)(4) (Burns 1986) (as amended by Pub. L. No. 229-1985 § 2, April 19, 1985). Whether this means that the court misread the enacting legislature's intent or that the fireworks industry now had sufficient political clout to get its way is unclear.

row construction of taxing statutes; and, looking in the other direction, construing tax exemptions against the taxpayer; and, the presumption that statutes are prospective unless they are remedial or procedural. It is usually a mistake to assume that these presumptions implement legislative intent in any realistic sense of the term. A presumption serves that purpose only when the reader can confidently say that the legislature's failure to incorporate the presumption into the text is an obvious oversight, that applying the presumption "goes without saying." Instead, these presumptions are usually obsolete generalities. At best, they have little predictive value for the results of a case.⁶² This is documented in the Appendix to this Article, reporting Indiana cases that both follow and refuse to follow the presumptions traditionally invoked to justify specific statutory interpretations. At worst, judicial discussion of a presumption obstructs analysis, as when the judge speculates about whether a tax deduction should be subject to the presumption disfavoring tax exemptions,⁶³ or the majority invokes the presumption against taxation and the dissent invokes the maxim discouraging tax exemption.⁶⁴ The best course would be for the court not to invoke the substantive presumptions at all, a trend that may be discernible in at least some tax cases.⁶⁵

The only presumption with much explanatory power for predicting judicial decisions is that favoring the accused. Many of the cases on this issue, cited in Section III of the Appendix, gave the accused the benefit of the doubt, even to the point of allowing the appellate court

62. See Llewellyn, *supra* note 14.

63. Indiana Dep't of State Revenue v. Endress & Hauser, Inc., 404 N.E.2d 1173, 1176 (Ind. Ct. App. 1980) (it is not clear whether deductions are strictly construed, like exemptions; but, in any event, the case did not deal with a deduction *per se* because the issue was whether a deduction that was clearly allowed under the federal income tax is allowed under the Indiana income tax); Indiana Dep't of State Revenue v. Food Mkt. Corp., 403 N.E.2d 1093, 1101-02 (Ind. Ct. App. 1980) (Staton, J., dissenting) (deductions are strictly construed, like exemptions).

64. Indiana Dep't of State Revenue v. Food Mktg. Corp., 403 N.E.2d 1093 (Ind. Ct. App. 1980) (majority says tax statute should be interpreted in favor of taxpayer, *id.* at 1096, and Judge Staton, in dissent, says deductions are like exemptions, to be interpreted against taxpayer, *id.* at 1101-02); Dep't of State Revenue v. National Bank of Logansport, 402 N.E.2d 1008 (Ind. Ct. App. 1980) (majority says no ambiguity so no room to apply presumption against tax exemption; in any event, should interpret tax law in favor of taxpayer, *id.* at 1010, and Judge Buchanan, in dissent, applies a presumption against tax exemption, *id.* at 1011).

65. For example, no presumption was mentioned in the following tax cases: Blood v. Poindexter, 534 N.E.2d 768 (Ind. T.C. 1989); Matter of Souder's Estate, 421 N.E.2d 12 (Ind. Ct. App. 1981); Matter of Waltz' Estate, 408 N.E.2d 558 (Ind. Ct. App. 1980); Matter of Wisely's Estate, 402 N.E.2d 14 (Ind. Ct. App. 1980).

to reverse a trial court's finding on a question of fact.⁶⁶ In a few criminal cases, the background value favoring strict construction may explain the court's reading of the *mens rea* requirement into the text.⁶⁷

It is possible that another reader of Indiana opinions would uncover other cases in which intent appears to trump a clear text, but the effort would not be worthwhile. The statutory text can be defined in so many ways by expanding and contracting the relevant language that a plausible claim of textual uncertainty can often be made. Intent can also be identified in different ways, so that at least one plausible definition will coincide with a text-based argument. Clear conflict between text and intent is therefore unusual; probably only in a small number of cases there would be agreement that such a conflict existed.

In the meantime, more interesting statutory interpretation problems might be neglected. These problems concern how to interpret statutes with a complex text and with different types of evidence of legislative intent and background considerations, all of which must be filtered through the judge's perspective on which criteria of statutory meaning are most important. The following Part IIB turns to these issues.

B. Judicial Choice and Statutory Interpretation

How do Indiana courts make choices about what weight should be attributed to different criteria of statutory meaning and whether to apply any of the "Law and" approaches to statutory interpretation? Section IIB1 discusses cases in which the court appears to choose the plain meaning of the text as the dominant interpretive criterion, but in which there is evidence that policy considerations are driving the court's decision to defer to the text. The back and forth process of evaluating statutory language, legislative intent, and background considerations may eventually alight on the text, but the decision to favor the text over non-text based interpretive criteria seems influenced by the particular values served by this result.

Section IIB2 examines Indiana decisions to determine whether the "Law and" approaches to statutory interpretation have had any impact. Some evidence exists that the Law and Economics perspective, which

66. See *Sheppard v. State*, 484 N.E.2d 984, 988 (Ind. Ct. App. 1985) (the appellate court rejected a finding of fact by the trial court that phone calls were "coercive" and therefore constituted obstruction of justice).

67. *State v. Keihn*, 542 N.E.2d 963, 965-68 (Ind. 1989), *rev'g*, 530 Ind. App. 747 (Ind. Ct. App. 1988); *Miller v. State*, 496 N.E.2d 592, 593 (Ind. Ct. App.), *vacated*, 502 N.E.2d 92, 94 (Ind. 1986).

expects private interest bargaining to underlie a statute, has sometimes prevailed. The evolutionary approach to statutory interpretation is also occasionally adopted, but the courts are loathe to admit it. In any event, "Law and" perspectives are selectively applied, in keeping with a pragmatic and practical reasoning approach to statutory interpretation, rather than in the spirit of a devotee wholeheartedly committed to a particular "Law and" perspective.

1. *Judicial "Choice" to Rely on the Text.*—The judicial decision to rely on the text appears deferential, but we should not necessarily take judicial rhetoric at face value. The text may sometimes be chosen as part of a complex interpretive process whereby text, legislative intent, and background considerations interact to determine statutory meaning. This process can be observed in a group of Indiana cases dealing with law enforcement, means-tested welfare, and land use control by property owners. These areas of law raise difficult and contentious policy issues, and the court will often argue that it is simply deferring to the plain meaning of the text, eschewing policy concerns. There is no easy way to determine whether deference to the text is a neutral principle or whether the court defers to the text because it serves a particular policy objective, that remains unstated. However, we are entitled to be suspicious about the claim that deference to the text is a neutral principle if the text is *rejected* in other cases to implement the very same policies which were served by deference to the text in another case. This suspicion is reinforced if those policies are favored in deciding a case in which the statutory text is unclear. Policy choices, in other words, may sometimes drive the decision to defer to the text.

a. *Lawsuits involving law enforcement*

Two cases seem to apply the statutory text's plain meaning to prevent lawsuits that might disrupt law enforcement. In *Seymour National Bank v. State*,⁶⁸ the statute provided governmental immunity, as follows: a "governmental entity or an employee acting within the scope of his employment is not liable if a loss results from . . . the adoption and enforcement of, or failure to adopt and enforce, a law, . . . unless the act of enforcement constitutes false arrest or false imprisonment."⁶⁹ A plaintiff injured in a high speed police chase sued the state. The plain meaning of the text indicated that the defendant was immune and the majority agreed, stating that the statute granting immunity for "enforcement of . . . law" was clear.

68. 422 N.E.2d 1223 (Ind.), *reh'g granted*, 428 N.E.2d 203 (Ind. 1981).

69. *Id.* at 1223-24 (quoting IND. CODE § 34-4-16.5-3(7) (1974) (as amended in 1976)).

The dissenting judges thought that granting complete immunity to police officers engaged in law enforcement was harsh⁷⁰ and unreasonable.⁷¹ Justice Hunter rejected the view that the legislature intended a literal application of the statutory language, and invoked the image of a police car crashing into a playground.⁷²

On rehearing,⁷³ the majority adhered to its view that the text was clear, but then qualified its earlier opinion to preclude immunity if the acts were "so outrageous as to be incompatible with the performance of the duty undertaken. . . . Such acts, whether intentional or willful or wanton, are simply beyond the scope of employment."⁷⁴ The court did nothing to dispel the idea that plowing into a playground might be within the scope of employment and, therefore, immune.

In *Burks v. Bolerjack*, the plaintiff sued a sheriff for false imprisonment.⁷⁵ The statute protected government employees from suit, as follows: "A judgment rendered with respect to or a settlement made by a governmental entity bars an action by the claimant against an employee whose conduct gave rise to the claim resulting in the judgment or settlement."⁷⁶ A claim against the government arising from the same facts had been dismissed because the plaintiff failed to provide timely notice, and a subsequent suit against a sheriff was then dismissed under the statute on the ground that the statutory text's plain meaning barred the suit.

The court of appeals considered this result "absurd,"⁷⁷ and the supreme court's dissent deemed it "arbitrary and inequitable."⁷⁸ The lower court concluded that the claim would not have been barred if the plaintiff had sued the sheriff directly, without first suing the government. It therefore made no sense to bar the plaintiff from suing the government employee just because its suit against the government was not timely.⁷⁹ The supreme court's dissent interpreted the statute to apply only when the suit against the government was resolved on

70. *Id.* at 1227 (DeBruler, J., dissenting).

71. *Id.* at 1228 (Hunter, J., dissenting).

72. *Id.* at 1227-28 (Hunter, J., dissenting).

73. *Seymour Nat'l Bank v. State*, 428 N.E.2d 203 (Ind. 1981).

74. *Id.* at 204. At the same time, however, the majority admitted that immunity was unnecessary when acts were beyond the scope of employment because the government would not then be liable, and said nothing to dispel the impression that the state would not be liable if a police car engaging in a high speed chase crashed into a playground. *Id.*

75. 427 N.E.2d 887, 888 (Ind. 1981).

76. *Id.* at 889 (citing IND. CODE ANN. § 34-4-16.5-5 (Burns Supp. 1980)).

77. *Burks v. Bolerjack*, 411 N.E.2d 148, 151 (Ind. Ct. App. 1980)).

78. *Burks*, 427 N.E.2d at 891 (DeBruler, J., dissenting).

79. *Burks*, 411 N.E.2d at 151.

the merits, in effect extending the government's *res judicata* claim to employees.⁸⁰

The opinions in these two cases could be analyzed as simply a conflict between the statutory text and the potentially harsh policy implications of applying its clear meaning. In this view of the interpretive process, the harsh policy implications of tort immunity were irrelevant. The text simply prevailed. Another decision suggests, however, that policy concerns about disrupting law enforcement played a significant role in the court's decision to rely on the text.

*Gallagher v. Marion County Victim Advocate Program, Inc.*⁸¹ dealt with access to public records. The statute made available to the public "any writing in any form necessary, under or required, or directed to be made by any statute or by any rule or regulation"⁸² The writings at issue were material prepared by police officers at the scene of a crime or accident setting forth the location, time, and description of the event, with names of victims, witnesses, or suspects. These writings were sought by an association whose purpose was to aid victims of violent crime.⁸³

The text-based arguments marginally favored disclosure. As the dissent noted, the statute explicitly required a liberal construction of its provisions favoring disclosure,⁸⁴ and explicit exceptions from disclosure in other statutes did not mention the type of records in this case.⁸⁵ The dissenting judge also could not accept the dramatic consequences of barring disclosure, which left public access to routine police records at the unfettered discretion of the police department.⁸⁶

The majority decided, however, that these records were kept in accordance with discretionary police practice, which did not fall within the statute mandating disclosure of records "required" by "statute, rule or regulation."⁸⁷ The court took the somewhat unusual position

80. *Burks*, 427 N.E.2d at 891 (DeBruler, J., dissenting).

81. 401 N.E.2d 1362 (Ind. Ct. App. 1980).

82. *Id.* at 1363 (citing IND. CODE ANN. § 5-14-1-2(1) (Burns Supp. 1976)).

83. *Id.*

84. *Id.* at 1369-70 n.2 (Chipman, J., dissenting).

85. The majority dealt satisfactorily with the fact that a special exception from disclosure of police records had been deleted as the bill passed through the legislature. The draft from which this was deleted contained a broad definition of publicly available records. The final bill both deleted the exception and narrowed the definition. *Id.* at 1366. According to the majority, the combination of the deletion and the narrowing of the definition precluded any inference about disclosure of police records in the final statute. The dissent made much of the deletion, arguing that the deletion of an exception for police records implied a "conscious legislative decision to include police records within the definition of public records." *Id.* at 1370 (Chipman, J., dissenting).

86. *Id.* at 1369, 1371.

87. *Id.* at 1367-68.

that a later statute determining how agency rules were to be adopted defined what constituted a "rule" under the prior statute, even though the legislature whose intent was at issue could not have been aware of the later provision about adopting agency rules.⁸⁸

The majority was quite aggressive in asserting its disinterest in policy concerns, stating that "[i]n the construction of statutes, we have nothing to do with questions of policy and political morals; such matters are for the consideration of the Legislature. . . . Consideration of hardships cannot properly lead a court to broaden a statute beyond its legitimate limits."⁸⁹ The majority protested too much. Certainly, nothing in the statute's text forced or even strongly indicated a decision one way or the other. If anything, the text favored disclosure. It is hard to imagine that the court reached its decision without making a policy judgment that law enforcement might be too disrupted by permitting access to police records. We may, therefore, infer that the decisions relying on the text to provide immunity from suits that might interfere with law enforcement⁹⁰ were also influenced by the fact that deference to the text served the same goals.⁹¹ This inference is further reinforced by the fact that Indiana courts in *nonlaw* enforcement contexts do *not* favor sovereign immunity.⁹²

b. Means-tested welfare

*Indiana Department of Public Welfare v. Guardianship of McIntyre*⁹³ involved a Welfare Department claim to recoup government payments of medical expenses from a welfare recipient's subsequent

88. *Id.* at 1368. The dissent explicitly disagreed with this analysis. *Id.* at 1369 n.1 (Chipman, J., dissenting).

89. *Id.* at 1364.

90. *See supra* notes 68-81 and accompanying text.

91. Justice Hunter's opinion on rehearing in *Seymour Nat'l Bank v. State*, 428 N.E.2d 203, 205 (Ind. 1981) (Hunter, J., dissenting in part, concurring in part), also illustrates how text-based arguments are sensitive to policy concerns. Confronted with the majority's concession that the most extreme cases of wanton and willful misconduct did not constitute "enforcement of law" and were therefore not immune, *id.* at 204, he shifted the grounds of his dissent (which was unfavorable to immunity) to argue that the "enforcement of a law" language was ambiguous, rather than that its literal meaning should not be applied. *Id.* at 205-06 (Hunter, J., dissenting).

92. For example, in *Indiana State Highway Comm'n v. Indiana Civil Rights Comm'n*, 424 N.E.2d 1024 (Ind. Ct. App. 1981), the statute permitted suits against "persons." Despite a tradition against interpreting the statutory term "person" to include the state, the court permitted the suit, using very strong anti-immunity language. *Id.* at 1032 ("The logic of the law today does not support the use of sovereign immunity to bring the State outside a statute, when the statute strongly implies otherwise.").

93. 471 N.E.2d 6 (Ind. Ct. App. 1984).

tort recovery. The statute gave the government a lien against tort recoveries “to the extent of the amount paid by the department,”⁹⁴ in effect according the government a right of subrogation based on the financial aid it provided the tort victim. The court held that this language clearly gave the state a first claim to the entire tort recovery.

An initial pass at this language seems to support the majority’s conclusion that the statute “clearly” gives the government first claim. According to the dissent, however, policy considerations suggested that the funds should be allocated in accordance with the court’s discretion.⁹⁵ Insurance ceilings and defendant insolvency made recoveries inadequate and the plaintiff often had additional injury-related expenses that could be paid out of some portion of the recovery, if the government did not get it all. Without a clear statement in the statute, the dissent concluded that the statute incorporated the traditional judicial practice of exercising equitable discretion when distributing recoveries to holders of subrogation rights.

As for the statutory language, the dissent compared the language of the Indiana law to a Wisconsin statute⁹⁶ which stated that, after attorney fees, the money “paid by the state should be deducted next and the remainder paid to the public assistance recipient.”⁹⁷ *That* was clear language giving the government first claim to the tort recovery.

Under pressure from the dissent’s policy concerns and traditional equitable discretion practice, the majority was not so certain that the statute’s text was clear. It justified its result by expanding the relevant text to include a prior statute that had used the word “subrogation” and had been interpreted to give courts equitable discretion.⁹⁸ However, the term “subrogation” had been deleted from the statute by the time this case arose, which suggested that the discretionary judicial power to qualify the government’s recoupment rights had been withdrawn.⁹⁹

The majority did not explicitly reinforce its commitment to the text with policy justifications for not allowing judicial apportionment of tort recoveries, even though a concern for protecting government revenue was a strong candidate. Should we therefore assume that such policy concerns played no part in the decision? Was the text the most important criterion, with other considerations playing only a tangential role? Or was the text a convenient way to implement the policy of protecting government revenue?

94. *Id.* at 8.

95. *Id.* at 10 (Young, J., dissenting).

96. *Id.*

97. *Id.* at 9.

98. *Id.* at 8.

99. *Id.* at 8-9.

The decision in another welfare case involving eligibility for a state medical assistance program covering hospital treatment¹⁰⁰ suggests that the text is not the dominant criterion the court might have us believe. The statute made eligibility dependent on the claimant being "financially unable to defray" medical costs.¹⁰¹ The administering agency decided to use the financial standards in the federal-state Aid to Dependent Children (ADC) program. Because the claimant had too much income to receive ADC, she was not considered "unable to defray" medical costs. The court allowed the agency to use that standard to determine eligibility for state medical assistance, thereby making the claimant ineligible and forcing the hospital to seek recovery of the costs from the claimant.¹⁰²

No one would pretend that the statutory phrase "unable to defray" costs was clear, but the dissenting opinion favoring the welfare claimant seemed to have the better text-based argument. The dissent noted another statute that stated that the Welfare Department "may" recover medical expenses from a recipient who is able to repay medical costs over a period of time.¹⁰³ This would have provided a mechanism by which the claimant could have received medical assistance from the state and paid it back out of funds in excess of the ADC financial eligibility level. The majority resisted treating this statutory mechanism as a reason for precluding agency use of ADC standards for threshold eligibility. It interpreted the statute's text as applying only to future recoveries by the claimant after receipt of medical assistance, not to assets held at the time the medical help was provided.¹⁰⁴ The dissent objected to this distortion of the text, noting that the statutory repayment mechanism said nothing about payment only out of "future" recoveries but provided for execution of repayment contracts *whenever* the welfare department determined that repayment was possible.¹⁰⁵

The dissent also called attention to the strange policy effects created by the majority's decision. If the case involved the federal-state Medicaid program rather than a state aid program, the excess income would *not* have disqualified the claimant. Instead, any "excess" over minimum income levels for ADC eligibility would have been used to reimburse the government for the medical assistance. The state was therefore depriving the claimant of medical benefits by borrowing a federal-state

100. *Trustees of Ind. Univ. v. County Dep't of Pub. Welfare of Kosciusko County*, 426 N.E.2d 74 (Ind. Ct. App. 1981).

101. *Id.* at 75.

102. *Id.* at 76.

103. *Id.* at 77 (Staton, J., dissenting).

104. *Id.* at 76.

105. *Id.* at 77 (Staton, J., dissenting).

ADC income standard that the federal-state Medicaid program itself would not have used.¹⁰⁶ Finally, the effect of the majority's decision was to encourage claimants to defer purchase of medical help, which in the long run increases medical costs.¹⁰⁷

The dissent's discussion explicitly called attention to a theme the majority never acknowledged — that the real issue was how strongly to protect government revenues by making the hospital, rather than the government, seek reimbursement of medical costs out of any excess income.¹⁰⁸ Given the fact that the dissent had the better text-based argument, the suspicion arises that a concern with government revenues strongly influenced the majority's decision to place the financial burden on the hospital. This also supports the suspicion that relying on the text to give the government first claim to recoup medical costs from subsequent tort recoveries was influenced by the fact that it preserved government revenue.¹⁰⁹

c. Land use by property owners

Another example of a text-based opinion probably influenced by policy considerations is *Adult Group Properties, Ltd. v. Imler*.¹¹⁰ The case questioned whether a residential facility for the developmentally disabled could be excluded from a subdivision by a covenant limiting use to residential purposes, on grounds that the facility was run as a business. The majority read the statutory text very closely to favor the property owner's power to make land use decisions with minimal restraints.

The statute contained two sections, one limiting *zoning* laws hostile to residential facilities for the developmentally disabled, and the other limiting *private covenants* hostile to such facilities for both the disabled and mentally ill. The court compared the two sections. The *zoning* section stated that a zoning ordinance could not exclude a residential

106. *Id.* at 76 (Staton, J., dissenting).

107. *Id.* at 77 (Staton, J., dissenting).

108. *Id.* Compare Gary Comm. Mental Health Center, Inc. v. Indiana Dep't of Pub. Welfare, 507 N.E.2d 1019 (Ind. Ct. App. 1987), in which the court limited government aid to medical services provided "by a hospital." The statute provided for aid for services "in" a hospital but other portions of the statute referred to the services being provided "by" the hospital.

But see *State ex. rel. Van Buskirk v. Wayne Township, Marion County*, 418 N.E.2d 234 (Ind. Ct. App. 1981), in which the township trustee tried to limit welfare shelter benefits to renters, not owners. The court denied the trustee this power, observing that this would encourage mortgage default and homelessness. The consequence of the decision was, however, to deny discrimination between renters and homeowners, not necessarily to increase costs.

109. See *supra* notes 94-100 and accompanying text.

110. 505 N.E.2d 459 (Ind. Ct. App. 1987).

facility for the developmentally disabled "solely because the residential facility is a business." The *covenant* section used different language.¹¹¹ It stated that a covenant could not both allow residential use *and* prohibit a residential facility for the developmentally disabled and mentally ill. It failed to say that the covenant prohibition could not be based on the ground that the facility was a business. The court took this to mean that any business could be excluded by a covenant, including residential facilities for the developmentally disabled.¹¹² The majority also concluded that the residential facility was a business because of the landlord's profit-making motive, rather than the activities of those living in the house.¹¹³

This was a very close reading of the statute indeed given the statute's obvious purpose, noted by the dissent,¹¹⁴ of mainstreaming the developmentally disabled.¹¹⁵ Admittedly, there *was* a difference in the language of the zoning and covenant sections. However, it is more than likely that the statement in the zoning section, that a residential facility for the developmentally disabled cannot be zoned out on the ground that it is a business, applied to both the zoning *and* the covenant section. The drafting could have been more careful, but it is the majority's reading of the text that seems strange given the statutory purpose of mainstreaming the developmentally disabled.¹¹⁶ It also seems unlikely that the real estate developers and their advisors who are the likely audience for this statute would read it to permit private covenants to prohibit residential facilities that zoning laws could not prohibit. A policy preference for protecting a property owner's right to choose his neighbors almost certainly influenced the majority's decision to adopt a close text-based reading.¹¹⁷

111. The court emphasized that the sections were drafted the same year, reinforcing its argument that the difference was purposive. *Id.* at 462-63.

112. *Id.* at 463-64.

113. *Id.* at 469, 474 n.4 (Miller, J., dissenting).

114. *Id.* at 467 (Miller, J., dissenting).

115. *Id.* at 473-74 (Miller, J., dissenting).

116. After this decision, the Indiana legislature retroactively prohibited private covenants from excluding residential facilities for the developmentally disabled and mentally ill from residential areas on the ground that the residents are unrelated or for any other reason. Ind. Code § 16-13-21-14 (1988). The retroactive impact of this statute was upheld in *Minder v. Martin Luther Home Found.*, 558 N.E.2d 833 (Ind. Ct. App. 1990), *rev'g*, *Clem v. Christole, Inc.*, 548 N.E.2d 1180 (Ind. Ct. App. 1990). The opinion was written by Judge Miller, who had dissented in *Adult Group Properties, Ltd.*, 505 N.E.2d 459.

117. The court noted that the covenant limiting use to residential purposes was important to the property owners. *Adult Group Properties, Ltd.*, 505 N.E.2d at 461. The court also noted that any other reading of the statute would permit an unconstitutional taking of the landowner's property. *Id.* at 464-65.

2. *“Law and” Theories.*—We have said little in this review of Indiana cases about the “Law and” perspectives that appear so prominently in the current literature on statutory interpretation. There is a good reason for this. “Law and” perspectives provide only a partial description of the interpretive process. Despite the rhetoric, their purpose is to assure that a particular point of view receives some attention, not to completely explain the interpretive process. Thus, the Law and Economics perspective is an antidote for judges who engage in too freewheeling an extrapolation of statutory purpose, especially when that would undermine the text. And evolutionary perspectives brought by the judicial reader to the statute suggest that judges can sometimes update legislation, contrary to the common law view of statutes as static, time-bound documents.

There are, not surprisingly, some Indiana cases that look closely for the private interest bargain struck by the statute and others that consider the need to update statutes under certain circumstances. These cases are described in this section. There is no evidence, however, that these approaches are applied with a single-minded commitment.

a. Implementing the bargain

There are several ways the law and economics perspective on legislative bargaining can provide insight into statutory meaning. First, it can call attention to the possibility that the legislative intent consisted of a bargain. This occurred in a case in which a statute allocated service areas to electricity providers.¹¹⁸ A rural electric cooperative and investor-owned company filed a joint petition allocating a service area to the cooperative pursuant to the statutory procedures that required petitions to be filed by a certain date. The Utility Regulatory Commission failed to meet its statutory deadline for approving or disapproving the petition. After the specified time limits, the investor-owned company filed a petition to modify, which the Commission approved.¹¹⁹ The question was whether the statutory time limits were mandatory or whether the Commission could approve a modification after those limits had expired.

The court held that the time limits were mandatory, so that the Commission was not authorized to approve a petition to modify after the deadline.¹²⁰ It supported its conclusion with an explanation of the background for the statutory deadlines which was one of endless dis-

118. *United Rural Elec. Membership Corp. v. Indiana & Mich. Elec. Co.*, 549 N.E.2d 1019 (Ind. 1990), *rev'g*, 515 N.E.2d 1135 (Ind. Ct. App. 1987).

119. *Id.* at 1020.

120. *Id.* at 1023-24.

putes over service areas. The court observed that both rural electric cooperatives and investor-owned companies supported the legislation to bring these disputes to a halt,¹²¹ strongly implying that the deadlines were the product of an agreement between these two contesting interest groups. Permitting a later petition by the investor-owned company to challenge the prior petition filed in accordance with the statutory guidelines would unsettle the statutory bargain.

Second, the Law and Economics perspective can highlight the fact that a bargain omits certain groups. For example, the supreme court rebuffed an effort by a lower court to treat athletes as "employees" for Workers' Compensation.¹²² Its opinion rested on a text-based argument about the meaning of the language "contract of employment."¹²³ But the court also could have noted how unlikely it was that university athletes were included in the bargain underlying Workers' Compensation whereby a plaintiff gives up potentially large tort claims in exchange for certain but limited Workers' Compensation benefits.¹²⁴

Third, the Law and Economics perspective counsels against favoring one of the interests represented in the statutory bargain. Other interests, pushing in the other direction, may have negotiated limits to the statute's impact. Thus, favoring employees who apply for unemployment insurance when they are indirectly involved in a labor dispute may improperly displace the concerns of employers, who are also parties to the governing statute.¹²⁵

The use of the Law and Economics approach as an antidote to "liberal" interpretation of one of several conflicting legislative purposes¹²⁶ is both a strength and potential weakness. It is important to recognize statutory limits, but equally important to understand the role of judicial choice in defining those limits. Two interests may bargain to a statutory result, but identifying where the point of equipoise lies when the statute

121. *Id.* at 1021.

122. *Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170 (Ind. 1983), *rev'g*, 437 N.E.2d 78 (Ind. Ct. App. 1982).

123. *Id.* at 1172-73.

124. A complete argument about the statutory bargain would examine the state of the law when the Workers' Compensation statute was passed. If state university employees could not sue in tort, it is unlikely that they were part of the statutory bargain because they had nothing to give up in exchange. If student athletes can now sue in tort, an evolutionary approach to statutory interpretation might include them in the statute.

125. *See, e.g., Aaron v. Review Bd. of Ind. Employment Sec. Div.*, 416 N.E.2d 125, 132-33 (Ind. Ct. App. 1981) (court held that when nonstriking employees of a multi-plant employer are laid off as a result of a selective strike of that employer, they are directly interested in the labor dispute and therefore not eligible for unemployment benefits, if the nonstriking employees are in the same bargaining unit as the striking employees).

126. *See* Appendix § II.

is applied to specific cases depends on the strength and weakness of the values each interest group contributes to the statute. Defining that point requires policy judgments concerning those values, which is not mandated by what the legislature has done. An example from the Indiana cases concerns the interpretation of the Medical Malpractice Act, which requires choosing between protection of medical care providers and tort plaintiffs.

The Medical Malpractice Act was passed to protect health care providers from medical malpractice claims so that medical insurance would not drive them out of business. It is therefore readily understood as a private interest bill, protecting a group of potential defendants from common law liability. But how much protection should they receive?

“Malpractice” is defined as any “tort . . . based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient.”¹²⁷ “Health care” is defined as any “act or treatment performed or furnished, or which should have been performed or furnished, by a health care provider for, to, or on behalf of a patient during the patient’s medical care, treatment, or confinement.”¹²⁸ The statute established a panel of doctors to review claims, and permitted its conclusions about standard of care to be admitted into evidence.¹²⁹ It also imposed damage ceilings¹³⁰ and a special statute of limitations.¹³¹

In two cases, the court invoked the Act’s policy of protecting health care providers as support for a broad definition of those covered by the statute. For example, the statute covered suits by a “patient or his representative.” Representative was defined by the statute to include the patient’s “parents.” The parents were therefore subject to the act even when they sued on their own behalf, not for their child.¹³² Additionally, a plaintiff who had been committed to an institution at his wife’s request by a doctor who did not examine him was still a “patient” under the statute.¹³³ The court determined that the statute did not require the plaintiff to have a contract with the doctor, as long as his wife had one.

When the courts reached the question of the type of activity covered by the statute, however, they had more trouble interpreting the law.

127. IND. CODE ANN. § 16-9.5-1-1(h) (Burns 1990).

128. *Id.* § 16-9.5-1-1(i).

129. *Id.* § 16-9.5-9-1 to -10.

130. *Id.* § 16-9.5-2-2.

131. *Id.* § 16-9.5-3-1.

132. *Sue Yee Lee v. Lafayette Home Hosp. Inc.*, 410 N.E.2d 1319, 1323-24 (Ind. Ct. App. 1980).

133. *Detterline v. Bonaventura*, 465 N.E.2d 215, 217-19 (Ind. Ct. App. 1984).

In the 1982 case of *Methodist Hospital of Indiana, Inc. v. Rioux*, the plaintiff fell and broke a hip, alleging that the health care provider had "negligently . . . failed to provide appropriate care to prevent said fall and injury."¹³⁴ The court made the case sound simple, stating that the very broad language of the statute did not need construction, and that the "duty to provide a safe environment" was within the Medical Malpractice Act.¹³⁵ This construction favored the statute's pro-defendant purpose.

Two years later, however, the same district had second thoughts in *Winona Memorial Foundation of Indianapolis v. Lomax*, another "slip and fall" case.¹³⁶ The plaintiff alleged that the defendant was negligent in not maintaining the floor properly, causing her to trip on a protruding floorboard. Now the court thought that the statute needed construction,¹³⁷ and looked closely at the statutory purpose. It found that the statute applied only to "classic" medical malpractice, not liability for ordinary nonmedical accidents,¹³⁸ even though the statute's broad language defined "health care" as "any act . . . by a health care provider." The court looked at the text of the entire statute and pointed out that other provisions required an expert medical panel to give its opinion on whether the health care provider met customary standards of care. The panel's expertise seemed important only if the behavior being judged was medical malpractice.¹³⁹ *Rioux* was distinguished on the ground that the plaintiff in that case had alleged failure to provide appropriate care, and not, as in *Lomax*, negligence in maintaining the floor.¹⁴⁰

As a result of these decisions, the plaintiff's ability to proceed to settlement negotiations without the Act's limitations depends on careful drafting of the pleadings.¹⁴¹ The plaintiff who alleges negligence in

134. 438 N.E.2d 315, 316 (Ind. Ct. App. 1982).

135. *Id.* at 317 n.2.

136. 465 N.E.2d 731 (Ind. Ct. App. 1984).

137. *Id.* at 737-38.

138. *Id.* at 738-39. The court referred to statements by the statute's drafters, who represented the medical profession, that failed to mention general negligence claims as causing an insurance crisis for the profession. *Id.* at 739-40 n.7.

139. *Id.* at 735.

140. *Id.* at 741-42.

141. See also *Ogle v. St. John's Hickey Memorial Hosp.*, 473 N.E.2d 1055 (Ind. Ct. App. 1985) in which a hospital patient admitted because of suicidal tendencies was raped. Her claim was within the Act because she asserted that the hospital negligently failed to provide her with proper security, which the court interpreted to mean a failure to properly confine her, even though the reason why confinement was necessary was her suicidal tendencies, not a concern with being sexually assaulted. Presumably, if she had alleged negligent supervision of the rapist, her claim would not have been for malpractice and would be outside the Act.

building maintenance avoids the Act, at least at the initial stages of the lawsuit before the facts are developed, but a plaintiff who alleges improper medical care falls within the statute. This obviously creates significant liability exposure for medical care providers. The court's decision to accept this risk depends on its policy judgment about where to locate the point of statutory equipoise between the concerns of negligence plaintiffs and defendant health care providers.

The court explicitly accepted these implications later in *Methodist Hospital of Indiana, Inc. v. Ray*,¹⁴² in which a patient contracted Legionnaire's disease while in a hospital. The plaintiff alleged that faulty maintenance of the premises, rather than a nonsterile environment, was responsible for contracting the disease. The court held that this was sufficient to prevent the Act from applying at the outset of the case, but acknowledged that the Act might apply if the development of the facts subsequently demonstrated that medical malpractice was really at issue.¹⁴³

The shift in the court's attitude from *Rioux* to *Lomax* and *Methodist Hospital* toward permitting the plaintiff's pleadings to avoid initial coverage by the Medical Malpractice Act demonstrates a shift in the court's view of the appropriate balance between the statute's pro-defendant purpose and the plaintiff's traditional common law negligence claims. This balance is not determined by the statute, even a statute with strong private interest antecedents, but depends on the court's choice about how to balance the conflicting policies that underlie the statute.

b. Evolutionary interpretation

The common law always has been associated with evolutionary change, but courts have a much harder time justifying evolutionary interpretation of statutes. Except for some statutes with the appropriate

But see *Reaux v. Our Lady of Lourdes Hosp.*, 492 So. 2d 233, 234 (La. Ct. App. 1986) (Louisiana medical malpractice act does not cover case in which health care provider failed to provide security from intruders).

142. 551 N.E.2d 463 (Ind. Ct. App. 1990).

143. *Id.* at 468-69. A conflict between the Act's reach and limits was also resolved in *Collins v. Thakkar*, 552 N.E.2d 507, 511 (Ind. Ct. App. 1990). A doctor performed a nonconsensual abortion incident to an examination for pregnancy on a patient with whom he had had an affair. Because the doctor's action was an intentional tort not performed to provide medical services, it did not come within the Act. The dissent, *id.* at 512 (Sullivan, J.), determined that the Act applied to intentional torts performed in the defendant's capacity as a medical care provider, and was not limited to cases of medical negligence. *See also* *Midtown Community Mental Health Center v. Estate of Gahl*, 540 N.E.2d 1259, 1262 (Ind. Ct. App. 1989) (Medical Malpractice Act does not apply to suit against doctor for failing to warn decedent that a former patient was dangerous).

text and legislative intent (the classic example is the "restraint of trade" language in the antitrust laws),¹⁴⁴ courts are reluctant to admit that they update statutes, even when their opinions are best explained in evolutionary terms.¹⁴⁵

Courts have the easiest time updating statutes when the statute incorporates a common law power, but even then, judges seem unwilling to admit to what they are doing. They instead describe the exercise of this power as an application of the statute. An Indiana case dealing with the "open and obvious danger" defense to a strict liability tort claim illustrates this approach.¹⁴⁶

The plaintiff in *Koske v. Townsend Engineering Co.*, had been injured by a machine. The 1978 Product Liability Act explicitly stated that

the common law of this state with respect to strict liability in tort is codified and restated as follows: (a) One who sells any product in a defective condition unreasonably dangerous to any user or consumer or to his property is [liable under some circumstances].¹⁴⁷

In *Bemis Co. v. Rubush*¹⁴⁸ and later cases, Indiana common law was held to include the "open and obvious danger" defense. Nonetheless, in *Koske* the supreme court did not incorporate the common law doctrine into the statute, despite this statutory language. The court instead focused on other parts of the statutory text and found

the implication unmistakable that the open and obvious danger rule, as developed in *Bemis* and its progeny, was excluded from the Act's codification and restatement of the law of strict liability in tort. The Act not only employed the language of Restatement (Second) of Torts § 402A without explicitly incorporating the words open and obvious, or requiring that a defect be latent or concealed, but it also expressly delineated the allowable defenses to strict liability in tort to include eval-

144. See *United States v. Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

145. In one case, reluctance to admit a judicial power to change law led the court to insist that separation of powers required deferring to legislative intent when the legislature failed to reverse a long line of cases. The concurring judge got it right, however, when he affirmed the judge's power to decide whether its own decisions remained valid. *Cf. Miller v. Mayberry*, 506 N.E.2d 7, 11 (Ind. 1987) *with id.* at 12 (Shepard, C.J., concurring).

146. *Koske v. Townsend Eng'g Co.*, 551 N.E.2d 437, 442 (Ind. 1990), *rev'g*, 526 N.E.2d 985 (Ind. Ct. App. 1988).

147. *Id.* at 441-42 (citing IND. CODE § 33-1-5.1-3 (1988)).

148. 427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982).

uation of the product user's conduct only by a subjective rather than an objective standard.¹⁴⁹

Rejection of the common law "open and obvious danger" defense was a reasonable application of the common law *as of 1990* but a forced reading of the 1978 statutory text. The court of appeals, which had felt compelled to apply the common law rule because of the statutory language stating that the law was a codification and restatement of the common law, noted the current "trend away from rigid application of the rule."¹⁵⁰ If the statute incorporated an evolving common law, however, the court was free to reject the open and obvious danger rule in 1990. Only an unwillingness to admit a surviving evolutionary common law power¹⁵¹ can explain the court's forced reading of the statutory text.¹⁵²

149. *Koske*, 551 N.E.2d at 442.

150. *Koske v. Townsend Eng'g Co.*, 526 N.E.2d 985, 989 (Ind. Ct. App. 1988). Actually, the statute did not *compel* incorporation of the *Bemis* rule because that case was decided in 1981, *after* passage of the 1978 statute, and *Bemis*, therefore, was not part of the statute's context.

151. This decision seems aberrational when compared to a 1989 case affirming liability to bystanders under the 1978 statute. *State Farm Fire & Casualty Co. v. Strutco Div., King Seeley Thermos Co.*, 540 N.E.2d 597, 597-98 (Ind. 1989). The court emphasized the statute's incorporation of the common law, which covered bystanders. It shunted aside the statute's silence about bystanders, contrary to its approach in *Koske*, *supra* notes 148-50 and accompanying text, in which silence about the "open and obvious" rule was stressed as a factor excluding the defense. The only way to reconcile the two cases is on the ground of a judicial power to develop the common law that survives passage of the statute.

152. The court's reluctance to admit an evolutionary power sometimes extends to cases in which a common law power parallels statutes that deal partially with a particular problem. For example, in *Clipp v. Weaver*, 451 N.E.2d 1092 (Ind. 1983), a guest asserted an ordinary negligence claim against a boat operator. Indiana statutes provide limited liability for guests of car and aircraft operators (since 1929 and 1951 respectively). *Id.* at 1093-94, 1094 n.1. The common law also provides limited liability to landowners, but that rule has been under severe attack within legislatures and courts as unconstitutional denials of equal protection under state constitutions. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 216-17 (1984). The common law today would almost certainly favor ordinary negligence rules.

The court properly applied ordinary negligence standards to boat guests in what can be best understood as an updating of the common law. But it did not rely entirely on the common law. It cited a statute that boat owners were supposed to behave in a "careful and prudent manner, having due regard for the rights, safety and property of other persons." *Clipp*, 451 N.E.2d at 1094. Instead of just stating that it was using a statute as evidence of the common law standard of care, the court asserted that the "legislature has determined that a boat operator owes a duty of reasonable care to *all* persons, including guests," *Id.* (emphasis in original), thereby minimizing the appearance of an exercise of independent judicial power.

When a statute deals specifically with a problem, it may be difficult to know whether a parallel common law power survives. *See generally* G. CALABRESI, A COMMON LAW FOR

When the statute does not incorporate a common law power, the court's authority to update a statute is more problematic. The court appeared to exercise such authority, however, in a case where the court adapted statutory rights to general welfare assistance to modern values.¹⁵³ *Van Buskirk v. Wayne Township* involved a decision by the township trustee administering general assistance to provide shelter assistance only to renters, not homeowners. The statute specified that "[p]ublic aid by an overseer of the poor may include and shall be extended only when the personal effort of the applicant fails to provide one or more of the following items: . . . shelter"¹⁵⁴ Township trustees traditionally had great discretion in deciding how to help the poor. Because of this history, an interpretation of the statute to create mandatory duties to the poor was very questionable.¹⁵⁵ Nonetheless, the court held that the statute required provision of shelter and prohibited discriminating between homeowners and renters.¹⁵⁶ Despite a

THE AGE OF STATUTES 36-37 (1982). A court reluctant to admit it has such a power may find ways to disguise its exercise. See, e.g., *Call v. Scott Brass, Inc.*, 553 N.E.2d 1225 (Ind. Ct. App. 1990), in which a common law wrongful discharge claim against an employer for firing an employee who performed jury duty survived passage of a 1979 statute providing for the same cause of action with a shorter statute of limitations than the common law claim. The problem the court encountered was that under Indiana law, statutory rights are exclusive if they *create* a right. *Id.* at 1227. The court held that the plaintiff's right predated 1979, even though it was based on a 1988 case, because the 1988 case evolved from a 1973 decision protecting a plaintiff who was discharged for filing a Workers' Compensation claim. The more straightforward holding would have been that the court had an evolving common law power which survived the 1979 statute.

An alternative holding almost said as much. The court stated that the statute did not provide an exclusive remedy, *even if* the case law cause of action postdated the 1979 law. *Id.* at 1229. The reasoning, however, still concealed the exercise of a surviving common law power because the court emphasized the statute's failure to state that the remedy was exclusive. But surely the court was not arguing for a new rule that all statutory remedies are *nonexclusive*, absent a specific statutory statement. The court must have been exercising an evolving common law power to decide on a case by case basis that employer retaliation against employees may be actionable. The court tipped its hand in this respect when it explicitly noted the important values underlying jury duty. *Id.* ("the jury is an indispensable part of our system of justice . . .").

153. *Van Buskirk v. Wayne Township* 418 N.E.2d 234 (Ind. Ct. App. 1981).

A change in values should be distinguished from cases of changing facts, to which the values implicit in an old statute might apply. See, e.g., *State v. McGraw*, 480 N.E.2d 552, 554-55 (Ind. 1985) (computer use did not involve a "taking" when the user did not deprive the owner of anything), *rev'g*, 459 N.E.2d 61 (Ind. Ct. App. 1984). The distinction between fact and value, however, can be overdone. Judges may learn about the meaning of old values by applying them to new facts.

154. *Van Buskirk*, 418 N.E.2d at 240 (citing IND. CODE § 12-2-1-10(b) (1976)).

155. See Rosenberg, *Overseeing the Poor: A Legal-Administrative Analysis of the Indiana Township Assistance Program*, 6 IND. L. REV. 385, 385-86, 388-90 (1973).

156. *Van Buskirk*, 418 N.E.2d at 243.

few half-hearted text-based arguments,¹⁵⁷ the core of the decision was that providing benefits only to renters encouraged owners to default and become homeless.¹⁵⁸ It is hard to disagree with this policy and equally hard to justify the result in terms of traditional township trustee powers. The court was updating the statute to take account of modern sensibilities.¹⁵⁹

CONCLUSION

Our review of Indiana statutory interpretation cases helps to explain why this area of law is so complex. The decisions involve many factors that are easy to identify, but whose role in specific cases is hard to evaluate.

In any multi-factor analysis, there are two concerns — the weight and the value of particular variables. First, what weight does each factor have. In statutory interpretation, for example: Is the text very important, or just of modest weight? The same question can be asked about legislative intent and background considerations. Second, what value does a particular factor have on the facts of a particular case. Thus, the text may have little value in a particular case because it is obviously uncertain. And particular background considerations may have different values for different judges.

Weight and value can interact in complex ways. A factor may have a high value, such as concern for criminal or welfare claimants. But that factor's weight may be low because an advocate of text-based statutory interpretation does not believe that such concerns should ever be weighty in determining statutory meaning.¹⁶⁰ To complicate matters, judicial rhetoric is notoriously misleading in explaining multi-factor decisions, especially so in statutory interpretation cases, where the appearance of deference to plain meaning or legislative intent seems to implement legislative supremacy.

157. *Id.* at 241. As evidence that the legislature did not intend to limit “shelter” to renters, the court cited the detailed rule requiring the provision of “medical supplies for minor injuries and illness” as an example of when the legislature intended a provision to be precisely limited. The court also referred to the statutory policy favoring a “liberal” interpretation. *Id.* at 240-41 (citing IND. CODE. § 12-2-1-34 (1976)).

158. *Id.* at 241-42 n.6.

159. *See also* Indiana State Highway Comm’n v. Indiana Civil Rights Comm’n, 424 N.E.2d 1024, 1030-32 (Ind. Ct. App. 1981) (civil rights statute permitting cease and desist order against “persons” applies to government defendants, to implement the strong statutory policy; traditional rule exempting government from suits not apply in light of the decline of sovereign immunity as a common law doctrine).

160. A text-based interpreter may use substantive concerns, such as reliance interests, to support commitment to the text, but not care about their value in a particular case.

The reality of statutory interpretation is far more complex than claims of deference to plain meaning or legislative intent imply. The text and legislative intent are themselves complex concepts. Moreover, the judge's policy judgments inevitably play a role in shaping the ultimate decision about what the statute means. At least that is what the decisions (if not the rhetoric) in the Indiana cases show.

Appendix - Interpretive Presumptions

The indeterminacy of substantive background presumptions, despite their frequent invocation by courts, is well established. Although they may play some role in the back and forth process of working out statutory meaning, any general claim that they have predictive value is misleading, as the following citation of Indiana cases indicate.

I. Narrow Interpretation of Statutes in Derogation of Common Law

Followed - Wallis v. Marshall County Comm'rs, 546 N.E.2d 843, 844 (Ind. 1989) (mentions presumption), *rev'g*, 531 N.E.2d 1223 (Ind. Ct. App. 1988); State Farm Fire & Casualty Co. v. Strutco Div., King Seeley Thermos Co., 540 N.E.2d 597, 598 (Ind. 1989) (mentions presumption), *rev'g*, 530 N.E.2d 116 (Ind. Ct. App. 1988); Johnson v. Johnson, 460 N.E.2d 978, 979 (Ind. Ct. App. 1984) (mentions presumption); Thomas v. Eads, 400 N.E.2d 778, 780 (Ind. Ct. App. 1980) (mentions presumption).

Not followed - Koske v. Townsend Eng'g Co., 551 N.E.2d 437, 442 (Ind. 1990) (presumption not mentioned), *rev'g*, 526 N.E.2d 985 (Ind. Ct. App. 1988); Seymour Nat'l Bank v. State, 422 N.E.2d 1223 (1981) (majority did not mention presumption, but Justices DeBruler and Hunter in dissent did; *Id.* at 1227, 1229), *modified*, 428 N.E.2d 203, 204 (1981).

II. Liberal Interpretation of Social Legislation

A. Unemployment insurance

Followed - USS, a Div. of USX Corp. v. Review Bd. of Ind. Employment Sec. Div., 527 N.E.2d 731, 737 (Ind. Ct. App. 1988) (mentions presumption); Holmes v. Review Bd. of Ind. Employment Sec. Div., 451 N.E.2d 83, 86 (Ind. Ct. App. 1983) (mentions presumption). *Cf.* Sidell v. Review Bd. of Ind. Employment Sec. Div., 428 N.E.2d 281, 285 (Ind. Ct. App. 1981) (trade readjustment benefit statute - mention presumption).

Not followed - Aaron v. Review Bd. of Ind. Employment Sec. Div., 416 N.E.2d 125 (Ind. Ct. App. 1981) (presumption not mentioned); Jeffboat, Inc. v. Review Bd. of Ind. Employment Sec. Div., 464 N.E.2d 377 (Ind. Ct. App. 1984) (presumption not mentioned).

B. Means-tested welfare

Followed - Wilson v. Stanton, 424 N.E.2d 1042, 1045 (Ind. Ct. App. 1981) (mentions presumption).

Not followed - Gary Community Mental Health Center v. Ind. Dep't of Pub. Welfare, 507 N.E.2d 1019 (Ind. Ct. App. 1987) (presumption not mentioned).

III. Strict Construction of Criminal Law

Followed - Cook v. State, 547 N.E.2d 1118, 1119 (Ind. Ct. App. 1989) (mentions presumption); Douglas v. State, 484 N.E.2d 610, 613

(Ind. Ct. App. 1985) (mentions presumption); *Sheppard v. State*, 484 N.E.2d 984, 988 (Ind. Ct. App. 1985) (mentions presumption); *State v. McGraw*, 480 N.E.2d 552, 553 (Ind. 1985) (mentions presumption), *rev'g*, 459 N.E.2d 61 (Ind. Ct. App. 1984); *Doyle v. State*, 468 N.E.2d 528, 533-34 (Ind. Ct. App. 1984) (mentions presumption); *Gore v. State*, 456 N.E.2d 1030, 1033 (Ind. Ct. App. 1983); *Och v. State*, 431 N.E.2d 127, 131 (Ind. Ct. App. 1982) (mentions presumption); *Pennington v. State*, 426 N.E.2d 408, 410 (Ind. 1981) (mentions presumption); *Warren v. State*, 417 N.E.2d 357, 359 (Ind. Ct. App. 1981) (mentions presumption); *Lasko v. State*, 409 N.E.2d 1124, 1127 (Ind. Ct. App. 1980) (mentions presumption).

Not followed - *McAnalley v. State*, 514 N.E.2d 831, 833-34 (Ind. 1987) (mentions presumption); *Hill v. State*, 488 N.E.2d 709 (Ind. 1986) (presumption not mentioned), *rev'g*, 482 N.E.2d 492 (Ind. Ct. App. 1985); *Whitley v. State*, 553 N.E.2d 511 (Ind. Ct. App. 1990) (presumption not mentioned); *Alvers v. State*, 489 N.E.2d 83, 89 (Ind. Ct. App. 1986) (mentions presumption); *Hanic v. State*, 406 N.E.2d 335, 338 (Ind. Ct. App. 1980) (mention presumption).

IV. Tax Law

A. Interpret tax law in favor of taxpayer

Followed - *Indiana Dep't of Revenue v. Estate of Eberbach*, 535 N.E.2d 1194, 1196 (Ind. 1989) (mentions presumption); *Wechter v. Indiana Dep't of Revenue*, 544 N.E.2d 221, 224 (Ind. T.C. 1989) (mentions presumption), *aff'd*, 553 N.E.2d 844 (1990); *Indiana Dep't of State Revenue v. Food Mktg. Corp.*, 403 N.E.2d 1093, 1096 (Ind. Ct. App. 1980) (mention presumption).

Not followed - *Indiana State Bd. of Tax Comm'rs v. Ropp*, 446 N.E.2d 20, 24 (Ind. Ct. App. 1983) (mention presumption).

B. Interpret tax exemptions against taxpayer

Followed - *Indiana Dep't of State Revenue, Inheritance Tax Div. v. Estate of Wallace*, 408 N.E.2d 150, 154 (Ind. Ct. App. 1980) (mentions presumption).

Not followed - *Indiana Dep't of State Revenue v. Indianapolis Pub. Transp. Corp.*, 550 N.E.2d 1277, 1278 (Ind. 1990) (mentions presumption); *Beasley v. Kwatnez*, 445 N.E.2d 1028, 1030 (Ind. Ct. App. 1983) (mentions presumption). *Cf.* *Ind. Dep't of State Revenue v. National Bank of Logansport*, 402 N.E.2d 1008, 1010 (Ind. Ct. App. 1980) (majority says no ambiguity so no room to interpret statute strictly against the taxpayer).

V. Rule That Statutes Are Prospective Unless They Are Remedial or Procedural

Followed - *Bailey v. Menzie*, 505 N.E.2d 126, 129 (Ind. Ct. App. 1987) (statute providing new visitation rights in grandparents after adoptive parents sever the status held by natural parents is prospective);

Cardinal Indus. v. Schwartz, 483 N.E.2d 458, 460 (Ind. Ct. App. 1985) (statute removing the Board's jurisdiction is remedial and therefore retroactive); Tarver v. Dix, 421 N.E.2d 693, 696 (Ind. Ct. App. 1981) (statute which codifies common law presumption about who is biological father is procedural and retroactive). *Cf.* Wooley v. Comm'r of Motor Vehicles, 479 N.E.2d 58, 61 (Ind. Ct. App. 1985) ("substantive change" allowing habitual traffic offender to be eligible for probationary license applied retroactively).

Followed but with some definitional uncertainty about whether statute is remedial or procedural - Mounts v. State, 496 N.E.2d 37, 39 (Ind. 1986) (procedural statute retroactive; dissent, *id.* at 40, and lower court, 489 N.E.2d 100, 102 (Ind. Ct. App. 1986), labelled the statute "substantive" as applied to the facts and therefore prospective); Arthur v. Arthur, 519 N.E.2d 230, 232-33 (Ind. Ct. App. 1986) ("substantial change in policy" regarding property rights was prospective), *aff'd*, 531 N.E.2d 477 (Ind. 1988) (overruling court of appeals decision in Sable v. Sable, 506 N.E.2d 495, 496-97 (Ind. Ct. App. 1987), which had labeled the statute "remedial" and retroactive).

Not followed - even remedial and procedural statutes can be prospective - Gosnell v. Indiana Soft Water Serv., Inc., 503 N.E.2d 879, 880 (Ind. 1987) (allowing punitive damages is remedial but prospective); State *ex rel* Indiana State Bd. of Dental Examiners v. Judd, 554 N.E.2d 829, 832 (Ind. Ct. App. 1990) (new statute requiring lapsed licensee to take examination rather than pay fee impairs property rights; statute labelled remedial but given prospective effect); Turner v. Town of Speedway, 528 N.E.2d 858, 863 (Ind. Ct. App. 1988) ("remedial" statute prospective because creates new "right").

Decision on retroactivity made without labels - the case of statutes of limitations - A statute can shorten the period of limitations, but the courts engraft on the statute a "reasonable time" provision within which plaintiffs can sue. *See* Kemper v. Warren Petroleum Corp., 451 N.E.2d 1115, 1117 (Ind. Ct. App. 1983). The courts also prohibit revival of expired defendant liability, Indiana Dep't of State Revenue v. Puett's Estate, 435 N.E.2d 298, 301-02 (Ind. Ct. App. 1982), but this tidy "rule" will sometimes be violated. For example, a statute passed after expiration of the two-year statute of limitations on the mother's paternity cause of action permitted a child to sue for a paternity determination until his twentieth birthday. R.L.G. v. T.L.E., 454 N.E.2d 1268, 1270-71 (Ind. Ct. App. 1983). The decision applied the statute granting the child a cause of action retroactively, even though the mother's cause of action had expired before the statute took effect. Undoubtedly the court was influenced because the best interests of the child were involved. *See* Bailey v. Menzie, 542 N.E.2d 1015, 1018-19 (Ind. Ct. App. 1989) (parent did not have a vested

constitutional right in avoiding statutes promoting the best interests of the child, so statute could be applied retroactively).

VI. *Legislative Acquiescence in Agency Rules.*

The presumptions reviewed above are substantive in that they make assumptions about what substantive impact the legislature is likely to have intended. Another presumption — that the legislature intended to acquiesce in agency rules — is institutional in the sense of allocating rulemaking responsibility.

No clear rationale for this presumption is presented in the cases. The three most prominent are that longstanding rules should be followed, that the agency rule was contemporaneous with adoption of the statute, and that the agency has expertise. These rationales are grounded in different policy considerations. Longstanding rules are likely to have been relied on and to reflect considered agency judgment. Contemporaneous rules are supposed to reflect the intent of the legislature adopting the governing statute. Agency expertise supports deference to rules regardless of when and how long they have been in effect. The courts are not only unable to agree on which rationale(s) to rely on, but also fail to observe that none of them has anything to do with legislative intent by the acquiescing legislature. Judicial appeal to legislative acquiescence appears to be another example of judicial rhetoric that forces judgments into a legislative intent mold when the decision is based on other grounds.

Legislative acquiescence, even if it is an independent reason to defer to agency rules, is also a thin reed on which to rest a decision. Inaction by the legislature may be attributed to many reasons, having nothing to do with its approval or disapproval of an agency rule. And, in any event, legislative intent should be manifest through adoption of a statute, not silence.

There is a fourth rationale for judicial deference to an agency rule. If the legislature is aware of the rule and does not reject it, the court might place the burden of inaction on the legislature by upholding the rule. This is not a theory of legislative acquiescence, however, but of legislative responsibility, for which there is also some evidence in the Indiana cases.

The reliability of any of these rationales for deferring to agency rules is, somewhat puzzlingly, called into question by judicial statements that the court should not defer if the rule is “*wrong*” or “*incorrect*.” See *Indiana State Bd. of Tax Comm’rs v. Fraternal Order of Eagles, Lodge No. 255*, 521 N.E.2d 678, 680 (Ind. 1988); *Board of Trustees of Pub. Employees’ Retirement Fund v. Baughman*, 450 N.E.2d 95, 96 (Ind. Ct. App. 1983); *Lake County Beverage Co. v. 21st Amendment, Inc.*, 441 N.E.2d 1008, 1014 (Ind. Ct. App. 1982); *Beer Distrib. of Ind. v. State ex rel. Alcoholic Beverage Comm’n*, 431 N.E.2d 836,

840 (Ind. Ct. App. 1982); *Anderson v. Review Bd. of Ind. Employment Sec. Div.*, 412 N.E.2d 819, 822 (Ind. Ct. App. 1980); *Indiana Dep't of State Revenue, Gross Income Tax Div. v. Commercial Towel & Uniform Serv. Inc.*, 409 N.E.2d 1121, 1123-24 n.6 (Ind. Ct. App. 1980).

The following cases contain language advocating one or more of the above rationales for assuming that the legislature has acquiesced in an agency rule, although the cases vary in deciding whether the agency rule should be followed.

A. *The rule is longstanding*

Fraternal Order of Eagles Lodge No. 255 v. Indiana State Bd. of Tax Comm'rs, 512 N.E.2d 491, 495-96 (Ind. T.C. 1987), *rev'd*, 521 N.E.2d 678 (Ind. 1988); *Lake County Beverage Co. v. 21st Amendment, Inc.*, 441 N.E.2d 1008, 1014 (Ind. Ct. App. 1982); *Beer Distrib. of Ind. v. State ex rel. Alcoholic Beverage Comm'n*, 431 N.E.2d 836, 840 (Ind. Ct. App. 1982); *Astral Indus. v. Indiana Employment Sec. Bd.*, 419 N.E.2d 192, 198 n.6 (Ind. Ct. App. 1981); *Indiana Dep't of State Revenue, Gross Income Tax Div. v. Commercial Towel & Uniform Serv.*, 409 N.E.2d 1121, 1123-24 n.6 (Ind. Ct. App. 1980); *Indiana Dep't of State Revenue v. Endress & Hauser, Inc.*, 404 N.E.2d 1173, 1174 (Ind. Ct. App. 1980).

B. *The rule is contemporaneous with adoption of statute*

Fraternal Order of Eagles Lodge No. 255 v. Indiana State Bd. of Tax Comm'rs, 512 N.E.2d 491, 495 (Ind. T.C. 1987), *rev'd*, 521 N.E.2d 678 (Ind. 1988); *Lake County Beverage Co. v. 21st Amendment, Inc.*, 441 N.E.2d 1008, 1014 (Ind. Ct. App. 1982); *Beer Distrib. of Ind. v. State ex rel. Alcoholic Beverage Comm'n*, 431 N.E.2d 836, 840 (Ind. Ct. App. 1982); *Indiana Dep't of State Revenue, Gross Income Tax Div. v. Commercial Towel & Uniform Serv.*, 409 N.E.2d 1121, 1123-24 n.6 (Ind. Ct. App. 1980); *Indiana Dep't of State Revenue v. Endress & Hauser, Inc.*, 404 N.E.2d 1173, 1174 (Ind. Ct. App. 1980).

C. *The agency is knowledgeable*

In re CTS Corp., 428 N.E.2d 794, 798 (Ind. Ct. App. 1981) (specialized agency function requires deference). *Cf. Indiana Bell Tel. Co. v. Boyd*, 421 N.E.2d 660, 667 (Ind. Ct. App. 1981) (construction by agency charged with implementation); *Aaron v. Review Bd. of Ind. Employment Sec. Div.*, 416 N.E.2d 125, 139 (Ind. Ct. App. 1981) (same).

D. *The legislature is aware of the rule or had an opportunity to amend the statute to reject the rule and did nothing*

Fraternal Order of Eagles Lodge No. 255 v. Indiana State Bd. of Comm'rs, 512 N.E.2d 491, 496 (Ind. T.C. 1987), *rev'd*, 521 N.E.2d 678 (Ind. 1988). *Cf. Department of Revenue v. United States Steel Corp.*, 425 N.E.2d 659, 662 (Ind. Ct. App. 1981) (legislature presumed

to approve *court's* interpretation of law when it failed to take action rejecting it); *Thomas v. Eads*, 400 N.E.2d 778, 783 (Ind. Ct. App. 1980) (same, when legislature made other amendments but did not reject court's interpretation).

Strict Liability For Products: An Achievable Goal

JOHN VARGO*

I. INTRODUCTION

Recently, the Indiana Supreme Court has made great progress in affording greater protection for injured victims. In the areas of products liability and general tort law, the court's outstanding decisions in *Koske v. Townsend Engineering Co.*,¹ *Miller v. Todd*,² and *Stropes v. Heritage House Childrens Center*³ provide excellent examples of such progress. The Indiana Supreme Court is about to embark upon the interpretation of Indiana's Products Liability Act; and, after its decision in *Koske*, it appears that the court will make its interpretation with a "clean slate" because all prior common law precedent may be either accepted or ignored.⁴ Presently, Indiana is faced with a minor dilemma that presents the court with an opportunity to change products liability law.

II. THE DEMISE OF THE OPEN AND OBVIOUS DANGER RULE IN STRICT PRODUCTS LIABILITY

On March 6, 1990, the Indiana Supreme Court held that the open and obvious danger rule was no longer a barrier to recovery in strict liability actions. The well-reasoned decision of *Koske v. Townsend Engineering Co.*,⁵ written by Justice Dickson, determined that the Indiana Products Liability Act preempted the field of strict liability in tort, thus excluding the open and obvious danger rule that previously developed in Indiana's common law.

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1. 551 N.E.2d 437 (Ind. 1990).

2. 551 N.E.2d 1139 (Ind. 1990).

3. 547 N.E.2d 244 (Ind. 1989).

4. The *Koske* court held that with the 1978 Products Liability Act the legislature "entered, occupied, and preempted the field of product strict liability in tort." 551 N.E.2d at 442. Thus, any prior case law that conflicts with what the Indiana Supreme Court determines to be the intent of the legislature may be ignored. There does not seem to be any doubt that the 1983 amendments to the Products Liability Act will be included because the *Koske* court referred to such amendments in its conclusion that preempted strict liability. See *id.* n.2.

5. 551 N.E.2d 437.

In *Koske*, the plaintiff was injured at work while operating a skinner-slicer machine that processed pork jowls. The skinner-slicer machine was designed to cut the skin from the jowl and slash the top to reveal hidden abscesses. The machine used seventeen circular slashing blades at the top and one long skinning blade at the bottom to perform the process. Located along a processing line, the machinery contained a conveyor belt delivery and removal system. The plaintiff worked next to the conveyor line that removed the processed jowl from the machine. The plaintiff performed the final finishing touches on the jowl by removing any remaining imperfections.⁶

The plaintiff could readily observe the machine's whirling blades and that it had no point-of-operation guards. Although the skinner-slicer was designed for an automated process, its operation required human interaction in several circumstances. At least twice a week, the plaintiff unjammed the machine. Additionally, the machine had to be sanitized when it struck an abscess. This sanitization process caused the conveyor belt to become so slippery that the jowls would not automatically feed into the skinner-slicer; the workers were then required to hand feed the jowls into the point-of-operation. When hand feeding the skinner-slicer, the plaintiff protected herself from the machine's blades by using one jowl to push another into the machine. The accident occurred when the plaintiff used one jowl to force another into the machine. The jowl slipped over the top of the other, and the plaintiff's hand entered the machine's operating blades.⁷

At trial, engineering experts testified that the skinner-slicer machine was inadequately guarded and that the manufacturer, Townsend Engineering Company, had not seriously considered the potential dangers the machine posed to the operators when it was designed. Experts opined that it would be inexpensive to guard the machine and that other designs with enhanced safety features were feasible.⁸

Prior to the plaintiff's accident, the defendant knew the machine could not always be operated automatically and at times required manual feeding. In addition, Townsend also knew that the machine severely injured several other operators prior to plaintiff's injury. Immediately after the plaintiff's injury, Townsend recalled the machine and designed a new one that included safety features to prevent the workers from entering the point-of-operation.⁹

Thus, the evidence clearly revealed that the plaintiff, Margaret Koske, was injured by a product that had an open and obvious danger. Under

6. *Id.* at 439.

7. *Id.*

8. *Id.* at 439-40.

9. *Id.*

prior Indiana law, she would likely have been deprived of recovery.¹⁰ The *Koske* court reexamined the open and obvious danger rule enunciated in *Bemis Co. v. Rubush*.¹¹ The *Bemis* court applied the rule to an accident that predated enactment of the 1978 Indiana Products Liability Act.¹² The *Koske* court reasoned that the Products Liability Act preempted the field of product-, strict-liability actions. Finding that the Products Liability Act excluded the open and obvious danger rule developed by prior Indiana common law, the *Koske* court held that the rule was inapplicable to strict-liability claims.¹³ In addition, the *Koske* court held that the rule does not necessarily preclude claims based on willful and wanton misconduct.¹⁴

Twenty-one days after the *Koske* decision, the Indiana Supreme Court decided *Miller v. Todd*.¹⁵ In *Miller*, the plaintiff, Carolyn Miller, sustained severe injury to her right leg in a motorcycle accident. Carolyn was a passenger on a motorcycle driven by William Todd who lost control of the motorcycle when it skidded on gravel. William was not injured because he previously installed crash bars on the front of the motorcycle. Unfortunately, the leg crash bars only extended protection for the driver and not for passengers.¹⁶ In an amended complaint, Carolyn sued the motorcycle manufacturer for failing to include rear passenger crash bars. Carolyn's action was premised on the theories of negligence and strict liability in tort by alleging the doctrine of crashworthiness.¹⁷ Crashworthiness or "enhanced injury" actions allege that the product defect, although not the cause of the accident, enhanced the plaintiff's injuries in an accident.¹⁸

The *Miller* court adopted the reasoning of the classic case of *Larsen v. General Motors Corp.*¹⁹ *Larsen* held that in product negligence actions, the vehicle manufacturer has a duty to use reasonable care to avoid subjecting the user to unreasonable risks of injuries if the vehicle is involved in an accident.²⁰ Vehicle accidents, according to *Larsen*, are

10. See *Bemis Co. v. Rubush*, 427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982).

11. 551 N.E.2d at 440.

12. 427 N.E.2d at 1059.

13. 551 N.E.2d at 442.

14. *Id.* at 443-44. The language of the court might also indicate that the Indiana Products Liability Act does not affect other actions based upon the Uniform Commercial Code or actions under separate theories of strict liability. See RESTATEMENT (SECOND) OF TORTS § 402B (1965).

15. 551 N.E.2d 1139 (Ind. 1990).

16. *Id.* at 1140.

17. *Id.*

18. *Id.*

19. 391 F.2d 495 (8th Cir. 1968).

20. *Id.* at 502.

not only a foreseeable but also an inevitable result of vehicle usage.²¹ In light of this product environment, the *Larsen* court reasoned that the manufacturer would be liable for the portion of the plaintiff's injury over and above the injury that probably would have resulted absent the design defect.²²

After adopting the crashworthiness doctrine, the *Miller* court discussed the issue of the open and obvious danger rule. Referring to its prior decision in *Koske*, the *Miller* court held that the open and obvious danger rule did not bar the plaintiff's recovery in strict-liability actions based on the Indiana Products Liability Act.²³ Next, the *Miller* court examined the plaintiff's negligence allegations, and held that because the Products Liability Act only preempted the field of strict liability, the Indiana common law expressed in *Bemis* still operated in product negligence actions.²⁴ According to *Miller*, products liability actions premised on a negligence theory were subject to the Indiana doctrine of open and obvious danger; thus, the grant of summary judgment for the defendant motorcycle manufacturer was appropriate as to the negligence theory.²⁵

III. A DILEMMA IN THE MAKING: RETENTION OF THE OPEN AND OBVIOUS DANGER RULE IN PRODUCTS NEGLIGENCE CASES

The *Koske* and *Miller* decisions appear to be logical and progressive; however, the retention of the open and obvious danger rule in products-negligence actions creates a theoretical dilemma. This dilemma is revealed in the 1985 Indiana Supreme Court decision of *Bridgewater v. Economy Engineering Co.*²⁶ In *Bridgewater*, the court declared that the open and obvious danger rule was only applicable to products liability cases and *not* to other types of negligence cases.²⁷ *Bridgewater* created an anomalous situation by affording victims of product-related injuries less protection than victims of nonproduct-related injuries.²⁸ This anomaly was not explored in *Bridgewater*, and would have disappeared if the open and obvious danger rule was eliminated entirely in all actions. However, *Miller* reaffirmed the application of the rule in products-negligence actions. Thus, the question remains: Why should victims injured by neg-

21. *Id.*

22. *Id.* at 503.

23. 551 N.E.2d 1139, 1143 (Ind. 1990).

24. *Id.*

25. *Id.*

26. 486 N.E.2d 484 (Ind. 1985).

27. *Id.* at 489.

28. The open and obvious danger rule is a serious bar to a plaintiff's action; its application provides much less "protection" (*i.e.*, would bar recovery).

lightly made products receive less protection than victims of other types of negligence? The practical answer is that a victim injured by a defective product should ground his action on strict liability. However, this practical solution begs the question. The answer to the dilemma is found only by exploring the historical basis for products liability and the open and obvious danger rule.

IV. THE BACKGROUND OF THE DILEMMA: THE DEVELOPMENT OF NEGLIGENCE AND STRICT LIABILITY IN AMERICA

Generally, fault or negligence dominates liability for personal injury and property damage.²⁹ However, this was not always the case. Negligence as a moral, social, and legal concept only has been the predominant rule for the last two hundred years.³⁰ Prior to that time, many legal scholars believed that the legal community, as well as society as a whole, followed principles more akin to strict liability.³¹ In other words, a tortfeasor was responsible for the resulting damages, irrespective of fault.

During the industrial revolution, fault or negligence law took root and grew as a prevailing theory of liability.³² At that time, society firmly believed that the newly emerging industries deserved protection to promote growth. The belief was that industries would thrive if they were not burdened with all the losses that they actually caused. Fault or negligence principles perfectly served this social program.³³ Under fault or negligence principles, a defendant is not responsible for all of the damages he causes. Instead, the defendant is only responsible for damages and injuries that his unreasonable conduct causes; the defendant is not liable for reasonable conduct. In theory, a defendant wrongdoer can cause almost any type of harm and escape liability if the cost of such injury is less than the cost of preventing the injury. "There is essential truth, if dramatic oversimplification, in saying that the law of negligence privileges actors to kill or maim people carefully."³⁴ Thus, fault concepts allowed the defendant to cause any type of harm as long as the defendant acted reasonably. Emerging industries and enterprises flourished under the protective cover of negligence principles. Fault concepts coincided not only with the social desires of the industrial revolution, but also with

29. See 3 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 12.18 (2d ed. 1986) [hereinafter 3 HARPER, JAMES & GRAY].

30. *Id.* § 12.3.

31. *Id.* §§ 12.2, 14.1.

32. *Id.* § 12.3.

33. *Id.*

34. *Id.* § 16.9.

the nineteenth century individualism underlying the laissez faire political philosophy.³⁵

As negligence grew to dominate civil liability, strict liability continued to play a role in limited areas. The strict liability rule of *Rylands v. Fletcher*³⁶ spread from England to America.³⁷ Strict liability also was applied in other areas such as blasting operations, trespassing animals, keeping of dangerous animals, nuisance, misrepresentation, escape of fire, poisons, insecticides, herbicides, and operation of aircraft.³⁸

By the middle of the twentieth century, societal attitudes began to change about the need to protect industrial enterprises by negligence principles.³⁹ Along with this change in attitude came the recognition that negligence principles were affording insufficient protection to the consuming public for product-related injuries. As a result of this shift in the social climate, strict liability for all product injuries was planted in the early 1960s by *Greenman v. Yuba Power Products, Inc.*⁴⁰ and later rooted by the American Law Institute's adoption of section 402A of the Restatement (Second) of Torts.⁴¹ Strict liability soon spread throughout the United States to become the dominant theory of recovery for product-related injuries.⁴²

Strict liability, in the field of products law, is based upon one clear and overriding policy — affording greater protection to the injured consumer than that afforded by negligence law. The same change in social attitude that gave rise to strict liability also provided the impetus for expansion of negligence liability.⁴³ Negligence liability exposure increased as concepts of duty and foreseeability⁴⁴ were broadened, privity was eliminated,⁴⁵ *res ipsa loquitur* was extended,⁴⁶ and the patent danger rule (open and obvious danger rule) was eliminated.⁴⁷ The change in

35. *Id.* § 12.3.

36. 159 Eng. Rep. 737 (1865), L.R. 1 Ex. 265 (1866), L.R. 3 H.L. 330 (1868).

37. 3 HARPER, JAMES & GRAY, *supra* note 29, § 14.4.

38. *Id.* § 14.1.

39. See Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); 3 HARPER, JAMES & GRAY, *supra* note 29, § 28.27.

40. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

41. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

42. W. KEETON, PROSSER AND KEETON ON TORTS § 99, at 694 (5th ed. 1984) [hereinafter PROSSER & KEETON].

43. 3 HARPER, JAMES & GRAY, *supra* note 29, § 16.5.

44. *Id.* at n.63.

45. See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

46. See W. PROSSER, THE LAW OF TORTS § 39 (4th ed. 1971) [hereinafter PROSSER].

47. *Micallef v. Miehle Co., Division of Miehle-Goss Dexter, Inc.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

both warranty and negligence towards greater protection for the injured victim was so great by the early 1960s that the drafters of section 402A considered the adoption of strict liability to represent "only a small step, if any, beyond the state of the law that had been reached or was predictably about to be reached."⁴⁸

V. THE ORIGIN OF THE DILEMMA: THE HISTORY OF INDIANA'S OPEN AND OBVIOUS DANGER RULE

The history of the open and obvious danger rule is not difficult to trace. The rule is intertwined with nineteenth century negligence concepts concerning the liability of makers of chattels and privity. The privity concept, as it historically related to negligence actions, resulted from an erroneous interpretation of the infamous 1842 English case of *Winterbottom v. Wright*.⁴⁹ *Winterbottom* held that a passenger, who was not in privity with the defendant manufacturer, could not maintain a contract action against the defendant for injuries caused by the collapse of a mailcoach. Courts interpreted certain dicta in *Winterbottom* also to mean that there could be no action in tort without privity. This erroneous interpretation of *Winterbottom* dicta created the broad rule that a seller of defective goods was not liable to anyone but those in privity with him.⁵⁰ This "fishbone in the throat of the law,"⁵¹ grounded upon misinterpretation, was noted in a famous law review article in 1905;⁵² however, by that time the rule of privity was rooted deeply in the field of negligence law involving the sale of products.⁵³

Courts gradually began to recognize exceptions to the privity rule. By 1903, these exceptions were ably expressed in *Huset v. J.I. Case Threshing Machine Co.*⁵⁴ One of the exceptions identified in *Huset* was the manufacturer's failure to reveal concealed defects.⁵⁵ This exception

48. 3 HARPER, JAMES & GRAY, *supra* note 29, § 28.27.

49. 152 Eng. Rep. 402 (1842). See PROSSER, *supra* note 46, § 93.

50. PROSSER, *supra* note 46, § 93.

51. *Id.* § 96.

52. Bohlen, *The Basis of Affirmative Obligations in The Law of Torts*, 44 AM. L. REG. 209 (1905).

53. PROSSER, *supra* note 46, § 96.

54. 120 F. 865 (8th Cir. 1903).

55. There were at least three categories of exceptions to privity under *Huset*. The first concerned products that were considered "imminently dangerous." The second applied when the product or chattel was equated or related to the real property on which it was used, based upon *Heaven v. Pender*, 11 Q.B.D. 503 (C.A. 1883). The third involved the failure to disclose a known defect as a kind of fraud, which was based on *Langridge v. Levy*, 2 M. & W. 519, 150 Eng. Rep. 863 (1836), *aff'd*, 4 M. & W. 337, 150 Eng. Rep. 1458 (1838). See C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 300-01 (2d ed. 1969) [hereinafter GREGORY & KALVEN].

to the privity rule was based on concepts of fraud or deceit espoused in an 1837 English case⁵⁶ that predated *Winterbottom*. Thus, misrepresentation, deceit, or fraud — theories completely outside the field of negligence law — provided both a basis for liability and an exception to the privity rule.⁵⁷ By 1916, the renowned case of *MacPherson v. Buick Motor Co.*⁵⁸ eliminated the privity requirement in negligence actions, and the case received immediate acceptance in the legal community.

Indiana law can be evaluated against this historical background. The Indiana and Mississippi Supreme Courts ran a tight race to win the distinction of becoming the last state in the country to adopt the *MacPherson* rule.⁵⁹ Indiana's legal apathy received the following, well-deserved bashing:

Indiana may be the last state to accept *MacPherson v. Buick Motor Co.* as a controlling precedent — and even then with an assist from the Wisconsin Supreme Court. See *Wojciuk v. United States Rubber Co.*, 13 Wis. 2d 173, 108 N.W.2d 149 (1961), where the Wisconsin court applied what it assumed to be the Indiana law, the accident having occurred in that state, although the last time the Indiana Supreme Court had spoken on the matter was to reject the *MacPherson* rule in 1919.⁶⁰

After almost half a century of foot dragging, the Indiana Supreme Court adopted the *MacPherson* rule in *J.I. Case Co. v. Sandefur*.⁶¹ It is ironic that the same case which finally weeded the privity rule from the field of negligence law also served as the root of the open and obvious danger rule in Indiana. Prior to *Sandefur*, the legal community was unsure whether the archaic exceptions delineated in *Huset* were still applicable.⁶² Thus, when the plaintiff in *Sandefur* alleged wrongdoings on the part of the defendant, the allegations and proofs were clouded

56. *Langridge v. Levy*, 2 M. & W. 519, 150 Eng. Rep. 863 (1836), *aff'd*, 4 M. & W. 337, 150 Eng. Rep. 1458 (1838).

57. 3 HARPER, JAMES & GRAY, *supra* note 29, § 28.5.

58. 217 N.Y. 382, 111 N.E. 1050 (1916).

59. See PROSSER, *supra* note 46, § 96, at 643 n.23, in which Mississippi is cited as probably the last to accept *MacPherson* in 1966; however, GREGORY & KALVEN, *supra* note 55, at 307, thought Indiana might be the last.

60. GREGORY & KALVEN, *supra* note 55, at 307 n.3.

61. 245 Ind. 213, 197 N.E.2d 519 (1964).

62. This is evident because Indiana had not eliminated privity in negligence actions through the adoption of *MacPherson*. See *supra* notes 59-60. *Sandefur* noted that although several lower courts had confronted the privity issue, the Indiana Supreme Court "has never directly approved the principle in the *MacPherson* case . . ." 245 Ind. 213, 220, 197 N.E.2d 519, 522 (1964). The *Sandefur* court then discussed the *Huset* case as the applicable law absent an adoption of *MacPherson*. *Id.* at 221, 197 N.E.2d at 522.

with the language of 127-year-old English law premised on concepts outside negligence.⁶³

The *Sandefur* court's references to the concept of open and obvious danger can be interpreted in at least two ways. First, the *Sandefur* court's reference to open and obvious danger can be interpreted as mere make-weight or historical reference to a long-discredited rule that held sway in a pre-*MacPherson* era. This interpretation can be justified because the court cites *Huset* as an historical marker predating *MacPherson*.⁶⁴ In addition, when discussing the adoption of *MacPherson*, the *Sandefur* court noted that changing public policy was a major influence on the common law's elimination of the privity barrier.⁶⁵ Immediately following such comments, the *Sandefur* court added that the elimination of privity does not lead to the requirement that product manufacturers make accident-proof products and that the manufacturer has a duty to avoid hidden or concealed dangers.⁶⁶ This language, considering the time period, may not necessarily impose an absolute requirement that a product contain a latent defect or that liability be based solely on a latent defect. The *Sandefur* court again discussed the hidden defect concept when considering the facts of the case.⁶⁷ Thus, *Sandefur* arguably adopted a

63. See GREGORY & KALVEN, *supra* note 55.

64. See *id.*

65. "As stated by the leading authorities, public policy has compelled this gradual change in the common law because of the industrial age where there is no longer the usual privity of contract between the user and the maker of a manufactured machine." *Sandefur*, 245 Ind. 213, 222, 197 N.E.2d 519, 523.

66. "On the other hand, there must be reasonable freedom and protection for the manufacturer. He is not an insurer against accident and is not obligated to produce only accident-proof machines. The emphasis is on the duty to avoid hidden defects or concealed dangers." *Id.* (citing *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950)).

67. The *Sandefur* court described the plaintiff's injury as resulting from an alleged defect in the wooden cover over an auger on a combine. *Id.* at 218, 197 N.E.2d at 521. The spacing between a "safety catch" and the auger cover was alleged to have been beyond the tolerances of "good mechanical construction." *Id.* Such inappropriate spacing allowed the auger cover to "slip" into the operating area of the auger. *Id.* The plaintiff stood on the auger cover when it collapsed. *Id.* The *Sandefur* court's comments regarding the alleged defect were:

It is further urged that the proper materials were not used in the construction of the combine. A manufacturer may determine the character of the materials to be used primarily for the purpose of producing or manufacturing an "economy model," as compared with a luxury model—the life of one being much less than the life of the other. Yet there are reasonable limits on such "economy," for example: a machine may not be built with extremely weak or flimsy parts concealed by an exterior such as to mislead a user into believing it safe and stable when, in fact, it is not, thus causing a user to rely thereon, to his injury. This again is a question of fact, namely, was there a concealed defect or hidden

new rule that eliminated the privity requirement, discussed the adoption with reference to the old rule, and finally analyzed the facts of the case as they were presented and tried. Under this interpretation, the open and obvious danger language is mere dicta which can be ignored.

On the other hand, the *Sandefur* court's reference to open and obvious danger could be considered important enough that it forms the basis of negligence law applicable to the sale of products. If so viewed, *Sandefur* reveals only two possible sources for such rule: *Huset* and the 1950 New York decision of *Campo v. Scofield*.⁶⁸

Campo involved an injury caused by the exposed [open and obvious] rollers of a carrot topping machine. The *Campo* court held that the manufacturer had "no duty to guard against injury from a patent peril or from a source manifestly dangerous."⁶⁹ The *Campo* rule of nonliability for patent dangers came under scathing attack in 1956 by Professors Harper and James in their prestigious treatise on torts.⁷⁰ Harper and James noted that the *Campo* rule was actually based upon *Huset*.⁷¹ Harper and James discussed when the danger was open and obvious or when the consumer had received adequate disclosure of the danger:

[U]nder negligence principles the question would still remain whether unreasonable hazard is to be anticipated from the use of the article even though its dangerous condition is manifest. In an earlier day the test of ordinary care was applied only to the manufacturer of "inherently dangerous" articles, and these were narrowly defined as including only such things as food, drink, poisons and explosives. Against the dangers of machinery, the maker owed no duty of care, but only the duty to disclose latent perils known to him. "[T]he action against [him] . . .

danger to a user?

The trial court made a special finding in which it stated that plaintiff stepped on the cover on top of the auger and it gave way, permitting plaintiff's foot to get entangled in the auger, thus causing his injury. The court found that the lid failed to rest upon a brace or safety clip designed to support it; that it was a hidden defect not normally observable; that the defendant company failed to use lumber of the proper type and strength to hold the screws for the hinges; that the company failed to use the proper size screws, the size of which were hidden and were thus a latent danger; and that the injury of Sandefur was the proximate and direct result of negligence in the manufacture of the combine. The court did not make any finding that any contributory negligence existed.

Id. at 222-23, 197 N.E.2d at 523.

68. See *supra* notes 62 and 66.

69. *Campo v. Scofield*, 301 N.Y. 468, 472, 95 N.E.2d 802, 804 (1950).

70. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 28.5 (1956) [hereinafter 2 HARPER & JAMES].

71. *Id.* at n.5.

proceed[ed] . . . and [was] founded on the fact, that in selling the article he practiced fraud and deceit in concealing the defects” In such a context “of course” when it appeared that the purchaser knew of the danger “the bottom drop[ped] out of the case against the maker” Today, however, the negligence principle has been widely accepted in products liability cases; and the bottom does not logically drop out of a negligence case against the maker when it is shown that the purchaser knew of the dangerous condition.⁷²

The Harper and James treatise, condemning the open and obvious danger rule, was published before the *Sandefur* decision.⁷³ By 1964, it was clear that the rule itself was based on principles of deceit or fraud, principles that have absolutely no application to the rules of negligence.

After *Sandefur*, the Indiana Supreme Court did not render any substantial decision in the field of products liability law until 1981.⁷⁴ A notable exception to the court’s inactivity was its adoption of strict liability in 1973;⁷⁵ however, an Indiana federal court anticipated such action eight years earlier.⁷⁶ The Indiana Supreme Court’s inactivity in the field of products liability law may have been due to the vagaries of appellate practice and jurisdiction that afforded the court little opportunity to decide such issues.⁷⁷ Whatever the reason, this inactivity left the development of Indiana products liability law to the federal courts and the Indiana Court of Appeals.

During this same period, a revolution in American tort law was taking place; the courts were greatly expanding consumer rights in prod-

72. *Id.* at 1542-43 (citations omitted).

73. 2 HARPER & JAMES was published in 1956. *See supra* note 70.

74. *Ayr-Way Stores, Inc. v. Chitwood*, 261 Ind. 86, 300 N.E.2d 335 (1973) (adopted strict liability with little discussion about any substantive matters). *See Stapinski v. Walsh Constr. Co.*, 272 Ind. 6, 395 N.E.2d 1251 (1979) (vacated the court of appeals decision on the issue of an “as is” sale of a used vehicle by a nondealer owner); *Nissen Trampoline Co. v. Terre Haute First Nat’l Bank*, 265 Ind. 457, 358 N.E.2d 974 (1976) (vacated the court of appeals decision on procedural grounds). In 1981, the Indiana Supreme Court decided *Shanks v. A.F.E. Indus., Inc.*, 275 Ind. 241, 416 N.E.2d 833 (1981), *Dague v. Piper Aircraft Corp.*, 275 Ind. 520, 418 N.E.2d 207 (1981), and *Bridges v. Kentucky Stone Co., Inc.*, 425 N.E.2d 125 (Ind. 1981) before deciding *Bemis Co. v. Rubush*, 427 N.E.2d 1058 (Ind. 1981). Thus, the year 1981 was a “watershed” year between *Sandefur* and any substantive decision relating to products liability cases.

75. *Ayr-Way Stores, Inc. v. Chitwood*, 261 Ind. 86, 300 N.E.2d 335 (1973).

76. *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965).

77. The Indiana Supreme Court would not have control over the litigating parties’ decisions on jurisdictional matters, such as pursuing actions in federal court under diversity or deciding not to pursue actions beyond the Indiana Court of Appeals. Even the Indiana Supreme Court’s denial of transfer cannot be considered a purposeful inactivity because the court could approve of either the result or the manner in which the result was reached.

ucts liability law⁷⁸ and the rights of the injured party in the general area of negligence law.⁷⁹ Indiana followed the general flow of expanded consumer rights in product actions: Indiana courts adopted strict liability in 1965;⁸⁰ the courts found that compliance with federal and industry standards were insufficient to set the standard for defectiveness,⁸¹ that the lack of safety devices was a basis for defect,⁸² that defective component parts were a basis for liability,⁸³ that proximate cause and foreseeability concepts should be expanded,⁸⁴ that bystander recovery was allowed,⁸⁵ and that assumption of risk (incurred risk) was properly defined.⁸⁶ These and many other liberalized concepts were integrated into Indiana's common law. However, during Indiana's expansion of consumer rights in products liability, the *Sandefur* language, containing its antiquated concepts of the pre-*MacPherson* open and obvious danger rule, clung to Indiana decisions like a parasite. Between 1964 and 1976, at least eight Indiana products liability decisions were infested with such language.⁸⁷

In 1976, the New York Court of Appeals decided *Micallef v. Miehle Co., Division of Miehle-Goss Dexter, Inc.*⁸⁸ and rid itself of *Campo*. *Micallef's* rejection of the open and obvious danger rule followed the general trend toward expanding negligence concepts. *Micallef* recognized that the rule was "a vestigial carryover from pre-*MacPherson*" law requiring a finding of deceit to support recovery.⁸⁹ The *Micallef* court rejected the rule, stating that it amounts to assumption of risk as a

78. See PROSSER & KEETON, *supra* note 42, § 99, at 694; 3 HARPER, JAMES & GRAY, *supra* note 29, § 28.1.

79. See 3 HARPER, JAMES & GRAY, *supra* note 29, § 16.5.

80. See *Greeno*, 237 F. Supp. 427.

81. See, e.g., *Gilbert v. Stone City Constr. Co.*, 171 Ind. App. 418, 357 N.E.2d 738 (1976); *Dudley Sports Co. v. Schmitt*, 151 Ind. App. 217, 279 N.E.2d 266 (1972).

82. See *Gilbert*, 357 N.E.2d at 744.

83. *Noefes v. Robertshaw Controls Co.*, 409 F. Supp. 1376 (S.D. Ind. 1976).

84. See *Lantis v. Astec Indus. Inc.*, 648 F.2d 1118 (7th Cir. 1981); *Huff v. White Motor Corp.*, 565 F.2d 104 (7th Cir. 1977); *Newton v. G.F. Goodman & Son, Inc.*, 519 F. Supp. 1301 (N.D. Ind. 1981); *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776 (N.D. Ind. 1969); *Dudley Sports Co. v. Schmitt*, 279 N.E.2d 266 (Ind. Ct. App. 1972).

85. *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776 (N.D. Ind. 1969); *Chrysler Corp. v. Alumbaugh*, 168 Ind. App. 363, 342 N.E.2d 908 (1976).

86. *Kroger Co. v. Haun*, 177 Ind. App. 403, 379 N.E.2d 1004 (1978).

87. For a comprehensive summary of these cases, see Vargo, *Products Liability, 1976 Survey of Recent Development in Indiana Law*, 10 IND. L. REV. 265, 380-81 n.61 [hereinafter Vargo, *1976 Products Liability Survey*]. See also Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397 (1979).

88. 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

89. *Id.* at 384, 348 N.E.2d at 576, 384 N.Y.S.2d at 120. For a summary of *Micallef's* reasoning see Vargo, *1976 Products Liability Survey*, *supra* note 87, at 281-82; 3 HARPER, JAMES & GRAY, *supra* note 29, § 28.5.

matter of law without proof of subjective appreciation.⁹⁰ Furthermore, the rule is inconsistent with negligence law because it eliminates the duty to develop a reasonably safe product by granting immunity for patent perils.⁹¹ The *Micallef* court recognized that negligence law ought to discourage misdesign and defects rather than encourage them in an obvious form.⁹²

With the overruling of *Campo*, Indiana decisions could have recognized the open and obvious danger rule as a dinosaur that survived past its day.⁹³ However, because the Indiana Supreme Court did not have the opportunity to address the *Sandefur* language, the rule lived on in the lower courts.

By 1981, a considerable array of cases and articles condemned the open and obvious danger rule,⁹⁴ and the Indiana Supreme Court had the opportunity to logically swat it aside. However, in *Bemis Co. v. Rubush*,⁹⁵ Justice Pivarnik decided not only that the open and obvious danger rule should survive to be applied in negligence, but also that it

90. *Micallef*, 39 N.Y.2d at 384, 348 N.E.2d at 576, 384 N.Y.S.2d at 120.

91. *Id.* at 384, 348 N.E.2d at 576, 384 N.Y.S.2d at 120.

92. *Id.* at 384-85, 348 N.E.2d at 576-77, 384 N.Y.S.2d at 120-21 (citing *Palmer v. Massey-Ferguson, Inc.*, 3 Wash. App. 508, 476 P.2d 713, 719 (1970)).

93. See Vargo, 1976 *Products Liability Survey*, *supra* note 87, at 282.

94. A partial list of the cases and articles include: *Mitchell v. Ford Motor Co.*, 533 F.2d 19 (1st Cir.), *cert. denied*, 429 U.S. 871 (1976); *Davis v. Fox River Tractor Co.*, 518 F.2d 481 (10th Cir. 1975); *Krugh v. Miehle Co.*, 503 F.2d 121 (6th Cir. 1974); *Ford v. Harnischfeger Corp.*, 365 F. Supp. 602 (E.D. Pa. 1973); *Dorsey v. Yoder Co.*, 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3rd Cir. 1973); *Beloit Corp. v. Harrell*, 339 So. 2d 992 (Ala. 1976); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 543 P.2d 209 (Alaska 1975), *modified*, 555 P.2d 42 (Alaska 1976); *Byrns v. Riddell, Inc.*, 113 Ariz. 264, 550 P.2d 1065 (1976); *Lugue v. McLean*, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972); *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); *Farmhand, Inc. v. Brandies*, 327 So. 2d 76 (Fla. Ct. App. 1976); *Olson v. A.W. Chesterton Co.*, 256 N.W.2d 530 (N.D. 1977); *Rourke v. Garza*, 530 S.W.2d 794 (Tex. 1975); *Brown v. Quick Mix Co.*, 75 Wash. 2d 833, 454 P.2d 205 (1969); James, *Products Liability*, 34 TEX. L. REV. 44, 51 (1955); Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 400 (1979); Leibman, *Foreword, Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 1 (1981); Marschall, *An Obvious Wrong Does Not Make a Right; Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U. L. REV. 1065 (1973); Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 836-41 (1962); Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 307-310 (1977); Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1, 13-14 (1974); Vargo, 1976 *Products Liability Survey*, *supra* note 87; Vargo, *Symposium, Products Liability in Indiana: In Search of a Standard for Strict Liability in Tort*, 10 IND. L. REV. 871, 884-88 (1977); Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397 (1979).

95. 427 N.E.2d 1058 (Ind. 1981).

should be applied in strict liability actions. To make matters worse, the Indiana Supreme Court interpreted *Bemis* to mean that a product was not defective or unreasonably dangerous if it objectively presented an open and obvious danger.⁹⁶ Thus, the Indiana Supreme Court adopted a 127-year-old rule based upon deceit or fraud and injected it into both negligence and strict liability actions.

VI. THE RESOLUTION OF THE DILEMMA: WHAT DIRECTION WILL INDIANA TAKE IN PRODUCTS LIABILITY LAW?

An in-depth examination of the foundation of the open and obvious danger rule leads to the overwhelming conclusion that no justification exists for providing less protection to victims of products-related negligence than is provided to victims of nonproducts negligence. However, the resolution of this dilemma reveals an even greater one. The greater dilemma is created by a dichotomy in the conceptual approaches Indiana can take in tort law.

One approach recognizes the implementation of nineteenth century protectionism limiting defendants' liability for the injuries they cause while the other approach recognizes greater consumer protectionism by expanding liability. The resolution of the minor, theoretical dilemma by elimination of the open and obvious danger rule will not, by itself, resolve the larger dilemma posed by the dichotomy in such disparate legal approaches unless the basic foundations of both negligence and strict liability are explored.

The rationale of the open and obvious danger rule threatens to rise like a phoenix from the ashes of *Bemis* to hover over the future interpretation of products liability law in Indiana. In his dissenting opinion in *Miller*,⁹⁷ Justice Givan stated, "[T]here is in fact no such thing as strict liability in products cases."⁹⁸ Justice Givan argued, "[I]f we were dealing with strict-liability, the manufacturer would be held liable for placing his product in the stream of commerce absent any type of negligence . . . and to do so would place an unconscionable burden upon the manufacturers of various products."⁹⁹ In relation to the issue of products that lack safety devices, Justice Givan further argued that "there is no practical end to the myriad of improvements or additions that might be made to any given product to make it a safer product."¹⁰⁰

96. An excellent summary of the various interpretations given to the open and obvious danger rule under *Bemis*, *id.*, is provided in *Koske*, 551 N.E.2d 437, 441 (Ind. 1990).

97. 551 N.E.2d 1139, 1144-45 (Ind. 1990) (Givan, J., dissenting).

98. *Id.* at 1145 (Givan, J., dissenting).

99. *Id.* (Givan, J., dissenting).

100. *Id.* (Givan, J., dissenting).

Now that the *Koske* decision has determined that the Indiana Products Liability Act preempts all common law pertaining to strict liability, the Indiana Supreme Court will be presented with the opportunity to interpret the statute and determine whether Justice Givan's views will prevail or whether the statute is intended to preclude such legal concepts. New dilemmas may be avoided by exploring some of the issues and problems certain to confront the court.

VII. ASSORTED PROBLEMS FACED BY INDIANA CONCERNING ITS CHOICE OF DIRECTION IN PRODUCTS LIABILITY

A. *The Standard for Strict Liability: The Definition of "Defective Condition Unreasonably Dangerous"*

The 1983 amendments to the 1978 Indiana Products Liability Act will control all new developments of products liability in Indiana. The Act is patterned after section 402A of the Restatement (Second) of Torts, with some minor language differences.¹⁰¹ The language of section 3 of

101. The *Koske* court recognized that the language of the 1978 Indiana Products Liability Act was taken almost verbatim from RESTATEMENT § 402A. *Id.* at 442. The 1983 amendments, which made some changes, are still based upon § 402A.

The RESTATEMENT (SECOND) OF TORTS, § 402A states:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS, § 402A (1965) [hereinafter § 402A].

Similarly, IND. CODE § 33-1-1.5-3 states:

Section 3. (a) One who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to his property is subject to liability for physical harm caused by that product to the user or consumer or to his property if that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition, and if:

- (1) the seller is engaged in the business of selling such a product; and
 - (2) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which it is sold by the person sought to be held liable under this chapter.
- (b) The rule stated in subsection (a) applies although:
- (1) the seller has exercised all reasonable care in the preparation, packaging,

the Products Liability Act is almost identical to the section 402A "black letter rule" for strict liability, and any language differences between section 3 and section 402A do not appear to affect the implementation of strict liability.¹⁰² Section 3 uses the words "defective condition unreasonably dangerous," which are identical to section 402A.¹⁰³ Thus, Indiana's statutory standard for strict liability expressed as "defective condition unreasonably dangerous" could appropriately be analyzed by both the "history" of section 402A and its later interpretation by numerous courts.

1. *The American Law Institute and The Restatement (Second) of Torts.*—Restatement section 402A states that strict liability results from harm caused by a product sold "in a defective condition unreasonably dangerous."¹⁰⁴ Before embarking on any explanation of this language, it is imperative that any approach to section 402A itself is not one of "legislative interpretation." Section 402A must be understood for what it is — an historical guide for strict liability which was never intended to freeze the common law progress of strict liability.¹⁰⁵ Its black letter rules and comments must be understood against the background of the early 1960s when strict liability for all products was in its infancy. It is, by no means, the final determinate of the desirable development of common law then or now.¹⁰⁶ Section 402A's emphasis on "defect" and "unreasonable danger" reveals its schizophrenic nature with roots in both contract (warranty) and tort (negligence) law.¹⁰⁷ Although some of

labeling, instructing for use, and sale of his product; and

(2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

IND. CODE § 33-1-1.5-3 (1988).

102. Although § 3 contains some "negligence" language, it does not appear this will affect the application of strict liability principles. See Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 278-79 (1984) [hereinafter Vargo, *1983 Survey of Products Liability*].

103. § 402A, *supra* note 101.

104. *Id.*

105. Whenever § 402A is reviewed to determine meaning from its development, authors indicate that it is not to be interpreted like a statute. See, e.g., Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 812 (1976) (a review of § 402A in relation to its meaning for application to South Carolina's Products Liability Statute uses quotations around the word legislative when referring to the "legislative" history of § 402A). The appropriate method or approach to an examination of § 402A is described by Professor Oscar Gray. See 5 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 28.32A (2d ed. 1986) [hereinafter 5 HARPER, JAMES & GRAY].

106. Montgomery & Owen, *supra* note 105, at 812.

107. *Id.*

the section 402A comments are helpful, others are not or are at best confusing mainly because the section was originally based upon cases dealing with foodstuffs.¹⁰⁸ Professor Gray provides the following succinct evaluation of the problems created by the historical backdrop of section 402A:

Whether the emphasis is on "defect" or on the unreasonableness of the danger, two criteria that derive respectively from negligence and warranty law can affect liability: unreasonableness of the risk (assuming knowledge of the risk by the maker), and unmerchantability (assuming knowledge of the risk by the buyer). For these criteria, however, certain surrogate concepts are frequently substituted. This is usually done without sufficient recognition that they are merely surrogates for broader notions that have well-established histories and connotations of their own. Instead the surrogates are discussed as if they were the ultimate tests themselves, limited to the terms in which they have been expressed for convenience. For "negligence" there is often substituted "risk-utility" comparison. For "unmerchantability" there is often substituted a "consumer expectations" test. Each can be useful; and each can lead to unnecessary confusion if addressed literally and out of context from its historic source.¹⁰⁹

2. *The Drafting of Restatement Section 402A.*—In the late 1950s, section 402A was in a preliminary draft stage and was intended to be applied only to certain types of food cases.¹¹⁰ Strict liability was based upon food that was "in a condition dangerous to the consumer."¹¹¹ Dean Prosser, the reporter for the Restatement, later submitted to the council revised language that used the term "unreasonably dangerous."¹¹² The term "defective condition" was added because of the council's concern that courts would hold sellers of cigarettes, whiskey, and powerful drugs liable for harm resulting from the consumers' excessive use.¹¹³ The

108. *Id.* See also Fischer, *Products Liability—The Meaning of Defect*, 39 Mo. L. REV. 339 (1974); Schwartz, *Foreward: Understanding Products Liability*, 67 CAL. L. REV. 435 (1979); Vargo, *1987 Southern Methodist University Products Liability Institute: Discovery, Evidence and Tactics in the Trial of a Products Liability Law Suit Ch. 10, Unavoidably Unsafe Products Under Comment k—Beyond Drugs* (Matthew Bender 1987); Wade, *On the Nature of Strict Torts Liability for Products*, 44 Miss. L.J. 825 (1973).

109. 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A.

110. See *supra* notes 105, 108.

111. Wade, *supra* note 108, at 830-31.

112. *Id.*

113. *Id.*

final phrase "defective condition unreasonably dangerous" was adopted; however, the term "defective condition" was highly criticized as a possible source of confusion, especially in design and warning cases.¹¹⁴ The critics noted that the "defective condition" language could connote the requirement that a product be physically flawed, which in design and warning cases was not the intent of the language.¹¹⁵

During the floor debates, several members recognized that the expression "unreasonably dangerous" was sufficient, and the reporter, Dean Prosser, explained that he was indifferent to whether the "defective" language should remain.¹¹⁶ The Institute's members, tiring of the debate, decided to leave the defective language in the phrase.¹¹⁷ In its final form, "defective condition" was defined in the comments in terms of being "unreasonably dangerous." The two terms came close to being considered synonymous because each explained the meaning of the other.¹¹⁸ After section 402A was broadened to apply to all types of products, no reference was made to the "defective condition unreasonably dangerous" language.¹¹⁹ Thus, the history of section 402A and its comments reveal that it was originally premised solely on food-related cases, and the drafters had little concern for whether the key phrase "defective condition unreasonably dangerous" would cause future difficulties when the theory was applied to all products.¹²⁰

The American Law Institute, in guiding the evolution of strict liability, relied upon related concepts that developed in other areas of tort law, such as warranty and negligence.¹²¹ In warranty law, strict liability was originally based on tort; however, by the late 1700s, breach of warranty began to develop a contract basis¹²² that gradually grew to become highly developed in the law of sales (as expressed by the Uniform Sales Act and later the Uniform Commercial Code).¹²³ However, certain warranty actions never entirely lost their tort character, and strict liability was sometimes found regardless of any finding of agreement, misrepresentation, negligence, or privity.¹²⁴ Thus, warranty was a "curious hybrid born of the illicit intercourse of tort and contract, unique in the

114. Montgomery & Owen, *supra* note 105, at 819-23.

115. *Id.* at 819-20 n.54.

116. *Id.*

117. *Id.*

118. See 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A, at 574-75 nn. 6-7; Wade, *supra* note 108, at 830-31.

119. Montgomery & Owen, *supra* note 105, at 812.

120. *Id.*

121. See *supra* note 108.

122. *Id.* See also PROSSER & KEETON, *supra* note 42, § 99, at 634-37.

123. PROSSER & KEETON, *supra* note 42, § 99, at 634-37.

124. *Id.*

law.”¹²⁵ The drafters of section 402A resorted to the language of warranty cases to provide, at least by analogy, an expression of their ideas of the nature of strict liability. Such references to warranty related to warranty’s original tort basis, a warranty devoid of the contract theories of reliance, privity, specific promises, or agreements.¹²⁶

In searching for an expression of strict liability, the drafters’ use of the term “unreasonably dangerous” had overtones of negligence.¹²⁷ However, the drafters did not intend for negligence to be the foundation of section 402A liability; instead, the language “unreasonably dangerous” was the best expression available to them to indicate the tort or negligence heritage of strict liability.¹²⁸ Thus, the negligence methodology of weighing numerous factors for determining liability had its place in strict liability. The drafters also recognized that the words “unreasonably dangerous” could suggest that the product must be “ultrahazardous” or “abnormally dangerous,” which in turn would give the impression that the plaintiff would be required to prove that the product was unusually or extremely dangerous.¹²⁹ However, this was not the intent of the drafters of section 402A.¹³⁰

Historically, the drafters of section 402A and its comments used familiar terms related to the field of contracts (warranty) and negligence both to express and to justify strict liability for all products.¹³¹ A literal interpretation of the warranty and negligence language could lead to the undesired result of implementation of either contract or negligence law instead of “strict liability,” a result neither intended nor desired by the drafters of section 402A.¹³² The warranty and negligence language of section 402A was not the only possible source of confusion. Some confusion also resulted from the drafters’ focus. Although they recognized that strict liability could be based upon design and warning issues, the drafters focused primarily on problems presented by manufacturing defects.¹³³

3. *The Problems with the Consumer Expectation Test.*—The end result of section 402A and its comments was an excellent expression of strict liability if application was limited to a manufacturing defect in a food-related case. For example, if a manufacturer of baked beans sold

125. *Id.* at 634.

126. *Id.* at 634-37.

127. *Id.*

128. *Id.*

129. *See* Wade, *supra* note 108, at 832-33.

130. *Id.*

131. *See supra* note 108.

132. *Id.*

133. *Id.* *See also* 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A, at 577-78.

a can of beans containing bean shaped rocks, the consumer is not likely to discover the rocks because they would look like beans and would be covered with "gravy." If the consumer bit down on a rock and fractured a tooth, the consumer would have the classic type of injury caused by deleterious food. Under a negligence theory, the seller-manufacturer would probably escape liability because the seller would likely claim that the seller did not know or should not have known that the rocks were in the can of beans. In addition, it would be impossible for the seller to discover the rocks because the very process of attempting to find and eliminate the rocks would destroy the product. Furthermore, any attempt to eliminate bean-shaped rocks from the product would be too costly and would outweigh the risks under the economic analysis of the Learned Hand calculus of negligence.¹³⁴ Even the doctrine of *res ipsa loquitur* would seem to be of little assistance to the plaintiff in the baked bean example;¹³⁵ thus, the injured victim in this scenario would

134. One can easily imagine the futility of sorting through beans to discover bean-shaped rocks; any attempt would surely violate the "burden of precaution" portion of the Learned Hand calculus.

135. Traditionally, the following conditions are necessary before *res ipsa loquitur* will be applied:

(1) The accident must be one that ordinarily would not occur in the absence of negligence, or, as it is sometimes put, the instrumentality causing injury must be such that no injury would ordinarily result from its use unless there was negligent construction, inspection or use; (2) both inspection and use must have been at the time of the injury in defendant's control; (3) the injurious occurrence or condition must have happened irrespective of any voluntary action on plaintiff's part. See PROSSER, *supra* note 46, § 39.

Whether *res ipsa* would apply to injuries resulting from bean-shaped rocks in the baked bean example depends on how a court views *res ipsa loquitur*. If a court examines the incident with an "immature" or narrow view towards negligence law, then *res ipsa loquitur* is absolutely no assistance to the plaintiff. See Schwartz, *supra* note 108, at 455 (examination of the differences between a "mature" and "immature" system). Under an "immature" approach, the first element may not be satisfied because the process of how the bean-shaped rocks entered the baked beans may not necessarily be a genre of negligence on the part of the manufacturer. If a court takes the narrow view on the second element and requires that the injuring agency or instrumentality [product] must be in the possession or control of the defendant at the time of the accident, then *res ipsa loquitur* would not apply to the baked bean example because the plaintiff has control of the baked beans when the accident occurs.

For a long time, Indiana decisions took this narrow view. In *Evansville Am. Legion Home Ass'n v. White*, 154 N.E.2d 109 (Ind. 1959), the Indiana Supreme Court refused to apply *res ipsa loquitur* when the plaintiff was injured when she sat on a defective chair that collapsed. One of the reasons the *White* court denied plaintiff's recovery was because she had control of the chair at the time it collapsed. *Id.* at 110. The court's reasoning in *White* did not reflect the more "advanced" view of *res ipsa loquitur* that considers the control element at the time the plaintiff indicates the negligence took place (time of manufacture); e.g., *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453,

be uncompensated. However, strict liability would afford a remedy. All but the most stone hearted would have to admit that baked beans containing rocks resulted in a defective product. Under the "consumer expectation test" of comment i,¹³⁶ the defect (rock) is not contemplated by the ordinary consumer, and the plaintiff can recover. Note that the rule of strict liability allows recovery from the seller of the defective baked beans even though the seller could not, at any cost, eliminate the defect, and even though the defect was unknown or unknowable.

The application of strict liability, however, becomes much more difficult when the case involves the design of more complicated products.

455, 150 P.2d 436, 438 (1944).

Dean Prosser commented that when the control element has been literally applied it has led to "ridiculous conclusions, requiring that the defendant be in possession at the time of plaintiff's injury — as in the . . . case denying recovery where a customer in a store sat down in a chair, which collapsed." PROSSER, *supra* note 46, § 39.

Despite such a recognized narrow approach, the reasoning in *White* was followed until very recently. See *S.C.M. Corp. v. Letterer*, 448 N.E.2d 686 (Ind. Ct. App. 1983); *Bituminous Fire & Marine Ins. Co., v. Culligan Fyrprotexion, Inc.*, 437 N.E.2d 1360 (Ind. Ct. App. 1982); see also Vargo, *Torts, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 341, 372-74 (1984). Finally, in 1985 a more mature approach to the control element was taken by the Indiana Court of Appeals in *Shull v. B.F. Goodrich Co.*, 477 N.E.2d 924 (Ind. Ct. App. 1985). However, the *Shull* court struggled around former supreme court precedent, and it is not certain that the Indiana Supreme Court will follow the reasoning in *Shull*.

In some instances, courts will follow a rather "immature" or retrogressive approach to *res ipsa loquitur* by requiring a fourth element — the evidence of the true explanation of the accident must be more accessible to the defendant than to the plaintiff. PROSSER, *supra* note 46, § 39, at 244. If this fourth element, unequal accessibility or knowledge, is applied to the baked bean hypothetical, *res ipsa loquitur* appears inapplicable because the defendant may not know what happened. However, the fourth element is generally considered, at best, unimportant and should not be considered a factor in *res ipsa loquitur* cases. *Id.* at 254-55. Again, Indiana relies heavily on the equal knowledge-accessibility doctrine. See *White*, 154 N.E.2d at 111, which carries over into both the duty element of negligence and the affirmative defense of contributory negligence. See, e.g., *City of Alexandria v. Allen*, 552 N.E.2d 488 (Ind. Ct. App. 1990).

Justice Givan's reasoning that strict liability, as defined by the courts and the Indiana legislature in the Products Liability Act, is nothing more than the application of *res ipsa loquitur* does not appear to withstand close examination. Even assuming the Indiana Supreme Court took an expansive or mature view of *res ipsa loquitur*'s elements, such a view does not result in strict liability in many instances. See Schwartz, *supra* note 108, at 459-60.

136. RESTATEMENT (SECOND) OF TORTS, comment i, states:

Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics"

§ 402A, *supra* note 101.

If the defect is open and obvious (as was the lack of leg protection in *Miller*, or as a fan without a protecting grating), the "consumer expectation test" becomes unreliable or awkward.¹³⁷ Under such circumstances, the danger or defect is within the contemplation of the user who has no expectation of, or reliance on, the product's safety. In other words, patent dangers do not frustrate the consumers' expectations of safety.¹³⁸ If the "consumer expectation test" is literally applied, liability will be denied even when the seller could easily supply a less dangerous product at a reasonable cost.¹³⁹ The "consumer expectation test," as a measure of the phrase "defective condition unreasonably dangerous," also creates problems with situations involving bystander injury.¹⁴⁰ A bystander may well be the most "innocent" of injured parties who deserves the maximum protection of the law. However, to suggest that a nonuser bystander has any expectations concerning a product is stretching the term to its breaking point.¹⁴¹

Many courts overcome the shortcomings of the "consumer expectation test" by resorting to alternative grounds for finding liability.¹⁴² In the patent danger or bystander situations, the obvious method is to focus on the ease of alternative designs or guards that would protect the consumer or bystander from the danger posed by the product. If an alternative design or guard is inexpensive and the utility of the product is not severely impaired by such, the plaintiff is allowed to recover.¹⁴³ This approach, however, is nothing less than the negligence risk-utility balancing process.¹⁴⁴ If strict liability is to be retained, the risk-utility process must somehow differ from that used in negligence.

The drafters of Restatement section 402A were not completely unmindful of this competing nature between warranty and negligence as

137. See Fischer, *supra* note 108, at 348-52; Schwartz, *supra* note 108, at 471-81.

138. *Id.*

139. *Id.* See also Phillips, *Products Liability: Obviousness of Danger Revisited*, 15 IND. L. REV. 797 (1982).

140. See Fischer, *supra* note 108, at 348-52; Schwartz, *supra* note 108, at 471-81.

141. Schwartz, *supra* note 108, at 472-74.

142. See Schwartz, *supra* note 108, at 464-82. See also Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980).

143. See Schwartz, *supra* note 108, at 464-82. See also Owen, *supra* note 142. In *Koske*, the Indiana Supreme Court noted with regard to the skinner-slicer machine that a guard "would have been a very inexpensive safety measure" and "other feasible designs with enhanced safety were proposed." 551 N.E.2d 437, 440 (Ind. 1990). The rationale of *Koske* would surely apply to a bystander as well as a user.

144. When the cost of a feasible guard is contemplated, such costs must be considered a factor in the risk-utility balancing process as applied in negligence. See Montgomery & Owen, *supra* note 105.

alternative grounds for liability.¹⁴⁵ The “consumer expectation test” of comment i was not the sole basis of determining liability for “defective condition unreasonably dangerous.”¹⁴⁶ Found within comments g, h, i, j, and k are continuous cross references to both the balancing language of tort law (risks and utility) and the warranty language.¹⁴⁷ Thus, the phrase “defective condition unreasonably dangerous” cannot be totally understood without reading section 402A and its comments as a whole, and viewing them as an embryonic stage in the development of strict liability for products.¹⁴⁸

The “consumer expectation test” was designed to afford protection for consumers by establishing a true strict liability.¹⁴⁹ The test works quite well in many situations; however, serious problems develop when the consumer’s expectations are too high or too low.¹⁵⁰ In addition, the test can result in a lack of incentive for manufacturers to improve the safety of their products when such safety is quite feasible.¹⁵¹ Finally, the test does not appear to be applicable to bystanders.¹⁵² The drafters of section 402A did not desire such limitations.¹⁵³ Several approaches have been devised to avoid the limitations and problems associated with the “consumer expectation test.”

4. *The Risk-Utility Test: An Alternative to the Consumer Expectation Test.*—Contained within Restatement section 402A is a tort or negligence concept as reflected in the term “unreasonably dangerous.”¹⁵⁴ Under negligence, the standard of reasonableness is reflected in economic terminology by the now famous Learned Hand calculus of $B < PL$ wherein P is the probability of harm, L is the gravity of harm, and B is the burden of adequate precautions.¹⁵⁵ Thus, liability will result when the gravity of harm multiplied by its probability is greater than the burden of precaution. Under strict liability, commentators have refined the negligence calculus by applying more sophisticated balancing factors. Professor John Wade suggested the following factors:

- (1) The usefulness and desirability of the product — its utility to the user and to the public as a whole.

145. § 402A, *supra* note 101.

146. *Id.* comment i.

147. *See* Montgomery & Owen, *supra* note 105.

148. *Id.*

149. *Id.*

150. *Id.* *See also* Fischer, *supra* note 108, at 348-52.

151. *See* Montgomery & Owen, *supra* note 105.

152. *Id.*

153. *Id.*

154. *See generally id.*; Schwartz, *supra* note 108; 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A.

155. *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

- (2) The safety aspects of the product — the likelihood that it will cause injury, and the probable seriousness of the injury.
- (3) The availability of a substitute product which would meet the same need and not be as unsafe.
- (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
- (5) The user's ability to avoid danger by the exercise of care in the use of the product.
- (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
- (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.¹⁵⁶

Other scholars have proposed multifactor considerations in determining strict liability, factors which range from four to fifteen in number.¹⁵⁷

156. Wade, *supra* note 108, at 837-38.

157. Professors Montgomery & Owen suggest four factors:

- (1) The cost of injuries attributable to the condition of the product about which the plaintiff complains — the pertinent accident costs.
- (2) The incremental cost of marketing the product without the offending condition — the manufacturer's safety cost.
- (3) The loss of functional and psychological utility occasioned by the elimination of the offending condition — the public's safety cost.
- (4) The respective abilities of the manufacturer and the consumer to (a) recognize the risks of the condition, (b) reduce such risks, and (c) absorb or insure against such risks — the allocation of risk awareness and control between the manufacturer and the consumer.

Montgomery & Owen, *supra* note 105, at 818.

Professor Dickerson suggests five factors:

- (1) The product carries a significant physical risk to a definable class of consumer and the risk is ascertainable at least by the time of trial.
- (2) The risk is one that the typical member of the class does not anticipate and guard against.
- (3) The risk threatens established consumer expectations with respect to a contemplated use and manner of use of the product and a contemplated minimum level of performance.
- (4) The seller has reason to know of the contemplated use and possibly where injurious side effects are involved, has reasonable access to knowledge of the particular risk involved.
- (5) The seller knowingly participates in creating the contemplated use or in otherwise generating the relevant consumer expectations, in the way attributed

Multiple factors may be pertinent to liability determination in strict

to him by the consumer.

Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301, 331 (1967).

Professor Shapo recommends 13 factors:

1. The nature of the product as a vehicle for creation of persuasive advertising images, and the relationships of this factor to the ability of sellers to generate product representations in mass media;
2. The specificity of representations and other communications related to the product;
3. The intelligence and knowledge of consumers generally and of the disappointed consumer in particular;
4. The use of sales appeals based on specific consumer characteristics;
5. The consumer's actions during his encounter with the product, evaluated in the context of his general knowledge and intelligence and of his actual knowledge about the product or that which reasonably could be ascribed to him;
6. The implications of the proposed decision for public health and safety generally, and especially for social programs that provide coverage for accidental injury and personal disability;
7. The incentives that the proposed decision would provide to make the product safer;
8. The cost to the producer and the sellers of acquiring the relevant information about the crucial product characteristic and the cost of supplying it to persons in the position of the disappointed party;
9. The availability of the relevant information about the crucial product characteristic to person in the position of the disappointed party and the cost to them of acquiring it;
10. The effects of the proposed decision on the availability of data that bear on consumer choice of goods and services;
11. Generally, the likely effects on prices and quantities of goods sold;
12. The costs and benefits attendant to determination of the legal issues involved, either by private litigation or by collective social judgment;
13. The effects of the proposed decision on wealth distribution both between sellers and consumers and among sellers.

Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1370-71 (1974).

Professor Fischer lists 15 considerations:

- I. Risk Spreading
 - A. From the point of view of consumer
 1. Ability of consumer to bear loss.
 2. Feasibility and effectiveness of self-protective measures.
 - a. Knowledge of risk.
 - b. Ability to control danger.
 - c. Feasibility of deciding against use of product.
 - B. From point of view of manufacturer.
 1. Knowledge of risk.
 2. Accuracy of prediction of losses.
 3. Size of losses.
 4. Availability of insurance.

liability; however, practical application of fifteen such factors is probably too unwieldy for any court.¹⁵⁸ Thus, most jurisdictions that have considered the problem have retained the more traditional seven-factor test originally introduced by Professor Wade.¹⁵⁹ Regardless of which refined multifactor calculus is considered in strict liability, the question remains: How does the risk-benefit of strict liability differ from that of negligence? In other words, what is the difference between strict liability and negligence? On the surface, both appear to be accomplishing the exact same goals — calculating risks and benefits of the product. Based upon this alluring similarity, many opponents of consumer protection have proposed that products liability is better served under a negligence standard.¹⁶⁰

The similarity of both the language and the risk-benefit calculus between negligence and strict liability may also be the source of Justice Givan's statement that he does not believe that strict liability exists. Both the proposal for the return to a negligence system and Justice Givan's failure to recognize strict liability deserve careful consideration of the fundamental issues of strict liability.

5. *Comparison of Strict Liability and Negligence.*—If strict liability is to be explained, it must be in some manner compared with negligence. Before such comparison can be undertaken, a differentiation must be made between the "old" negligence system and the "new" negligence system.¹⁶¹ The "old" negligence system is generally reflected by the pre-*MacPherson* and *Sandefur* notions of liability. Under the "old" system, liability is negated by concepts such as privity, limited duty, open and obvious dangers, limited foreseeability, and causation, as well as narrow

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5. Ability of manufacturer to self-insure.
 6. Effect of increased prices on industry.
 7. Public necessity for the product.
 8. Deterrent effect on the development of new products.

II. Safety Incentive

- A. Likelihood of future product improvement.
- B. Existence of additional precautions that can presently be taken.
- C. Availability of safer substitutes.

Fischer, *supra* note 108, at 359.

158. See *Montgomery & Owen*, *supra* note 105, at 817.

159. *E.g.*, *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 525 P.2d 1033 (1974).

160. See Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] To Strict Liability To Negligence*, 33 VAND. L. REV. 593 (1980); Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643 (1978); Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976); Hoenig, *Product Designs and Strict Tort Liability: Is There a Better Approach*, 8 Sw. U.L. REV. 109 (1976).

161. A comparison between the "old" and "new" types of negligence as a recognition of expanding liability in a developing system has been examined as the differences between a "mature" and "immature" system. Schwartz, *supra* note 108, at 455.

interpretations of *res ipsa loquitur*.¹⁶² If strict liability is compared to this "older" negligence system, the differences are immense.¹⁶³

In most jurisdictions, the law of negligence has made vast changes from the "old" negligence system. The overall trend is toward imposing broader liability for the defendant and concomitantly providing more protection for the plaintiff.¹⁶⁴ Under the "new" negligence system, manufacturers are not only held to have duties based upon their actual knowledge of product defects but are also held to have duties based upon what they should have known as experts in their field of endeavor.¹⁶⁵

Foreseeability is expanded from intended use concepts to foreseeability of more remote usages of products;¹⁶⁶ custom is eliminated as an absolute standard of reasonableness;¹⁶⁷ governmental and industry standards are rejected as the measure of duty owed by manufacturers;¹⁶⁸ privity¹⁶⁹ and the open and obvious danger rule no longer bar recovery;¹⁷⁰ *res ipsa loquitur* and circumstantial evidence are applied in more and varied circumstances;¹⁷¹ and distinctions between misfeasance and non-feasance are eliminated.¹⁷² If strict products liability is compared to this "new" negligence system, the differences between the two theories are not so drastic. Thus, the greater the expansion of liability in the negligence system, the closer it approaches one of strict liability.¹⁷³

How, then, does strict liability compare to a "new" negligence system? The answer to this question reveals the essence of strict liability. Probably the most dramatic feature of strict products liability is the elimination of contributory negligence as an affirmative defense.¹⁷⁴ This feature is a great expansion of liability and affords considerable consumer protection over common law negligence. However, the effect of the elimination of contributory negligence has been somewhat blurred by jurisdictions that have applied comparative negligence to products liability actions.¹⁷⁵ Assumption of risk does not affect any real difference between

162. *Id.*

163. *Id.*

164. 3 HARPER, JAMES & GRAY, *supra* note 29, § 16.5, at 413.

165. *Id.* at 410-21. *See, e.g.,* *Dias v. Daisy-Heddon*, 390 N.E.2d 222, 227 (Ind. Ct. App. 1979).

166. 3 HARPER, JAMES & GRAY, *supra* note 29, § 16.5 n.63.

167. *See supra* note 81.

168. *Id.*

169. 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.16.

170. *Id.* § 28.5.

171. PROSSER, *supra* note 46, § 39.

172. *Id.* § 56.

173. *See supra* note 159.

174. *E.g., Gregory v. White Truck & Equip. Co.*, 323 N.E.2d 280 (Ind. Ct. App. 1975).

175. Schwartz, *supra* note 108, at 455-56.

the two systems because it is applicable to both; however, its harsh effect in both systems is somewhat ameliorated if it is considered as part of comparative negligence.¹⁷⁶

Disclaimers could be a source of distinction between strict liability and negligence. Disclaimers under the contract rules of the U.C.C. implied warranty may or may not be applicable to personal injury actions.¹⁷⁷ Strict products liability rejects the notion of disclaimers; however, negligence law might accept disclaimers under certain circumstances. Assuming that disclaimers are rejected in both strict liability and negligence and assuming that the defenses of contributory negligence and assumption of the risk are subsumed in comparative negligence, there is probably not a great deal of difference between the "new" negligence system and strict liability.¹⁷⁸

Outside the applicable defenses, there remains the core issue of the difference between the standards for strict liability and negligence. One primary difference is the focus of inquiry. In negligence, the focus is on conduct, and the liability issue is resolved by asking whether the manufacturer's conduct was faulty in producing a defect in the product.¹⁷⁹ In strict liability, the focus is on the product, and liability is determined by the existence of a defect in the product.¹⁸⁰

This frequently quoted "focus" rule makes some difference in the determination of liability between the two systems. In a manufacturing negligence case, the plaintiff must prove the manufacturer's faulty conduct.¹⁸¹ This is an almost overwhelming burden on the plaintiff for several reasons. The plaintiff may never be able to obtain information concerning the exact negligent act of the manufacturer's employees.¹⁸² The cost of discovering such information is probably prohibitive and may not be discovered at any cost because the particular circumstances may be unknown even to the manufacturer.¹⁸³ Resorting to *res ipsa loquitur* will probably not be of great assistance in many instances.¹⁸⁴ Strict liability, on the other hand, faces no problem with imposing liability in the manufacturing defect case.¹⁸⁵ If the product deviates from what the manufacturer intended and this deviation causes injury, then

176. *Id.* at 457.

177. *Id.* at 456-57.

178. *Id.*

179. *See supra* notes 105 and 108.

180. *Id.*

181. 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A.

182. *See supra* notes 105 and 108.

183. Schwartz, *supra* note 108, at 458-64.

184. *Id.*

185. *Id.*

liability is imposed. Strict liability's focus on the product defect indicates a marked difference from even a "new" negligence system that focuses on the manufacturer's conduct.¹⁸⁶

In design and warning cases, the comparison reveals more subtle differences. In a design defect situation, strict liability focuses on the product while negligence focuses on the conduct giving rise to such defect. This principle was concisely phrased as: "In the case of a design challenge the maker's sample becomes the target, not the test."¹⁸⁷ Thus, in strict liability, the focus is on the unreasonableness of the design; in negligence, the focus is on the unreasonableness of the manufacturer's conduct in reaching a design decision.¹⁸⁸ Some scholars believe that there is essentially no difference between an unreasonable design decision and an unreasonable design.¹⁸⁹ Warning cases also have been viewed as negligent in origin because the act of warning is one of conduct.¹⁹⁰ Such "return to negligence" propositions are intriguing and have surface appeal because of their simplicity; however, they fail to recognize several basic principles. First and foremost, the negligence system proposed must be the highly developed "new" negligence before it even approaches the goal of strict liability. Second, the return to simple negligence ignores several distinct differences that do exist between strict liability and even the "new" negligence in design and warning cases.¹⁹¹

6. *The Meaning of "Strict Liability."*—Although a multifactor risk-benefit test suggested by Professor John Wade is probably an improvement over the Learned Hand formulation of negligence, such factors do not, by themselves, express strict liability. Professors John Wade and Page Keeton gave real meaning to strict products liability when they said that knowledge of the defect or danger is imputed to the manufacturer.¹⁹² After such imputation, strict liability can be reduced to asking the question: Would a reasonable manufacturer place such a product on the market? If the answer to the question is no, then the manufacturer is liable for any damages caused by the product. Professor Keeton states the rule as:

A product ought to be regarded as "unreasonably dangerous" at the time of sale if a reasonable man with knowledge of the product's condition, and an appreciation of all the risks found

186. *Id.*

187. 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A.

188. Schwartz, *supra* note 108, at 458-64.

189. *Id.*

190. *Id.*

191. See *infra* notes 192-200 and accompanying text.

192. Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 39 (1973); see also Wade, *supra* note 108, at 834.

to exist by the jury at the time of trial, would not now market the product, or, if he did market it, would at least market it pursuant to a different set of warnings and instructions as to its use. Thus, a product is improperly designed if its sale would be negligence on the part of the maker who had full knowledge of all the risks and dangers that were subsequently found to exist in the product, regardless of the excuse that the maker might have had for his ignorance of such dangers. Since the test is not one of negligence, it is not based upon the risks and dangers that the maker should have, in the exercise of ordinary care, known about. It is, rather, danger in fact, as that danger is found to be at the time of the trial that controls.¹⁹³

The above test for imputing scienter to the manufacturer is actually the reverse side of the same coin¹⁹⁴ of the consumer expectation test of comment i.¹⁹⁵ In the consumer expectation test the question is: Would

193. Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 568 (1969).

194. This test is one in the same from both the consumer's and the manufacturer's perspective. See *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 491-98, 525 P.2d 1033, 1036-37 (1974) (citing *Welch v. Outboard Marine Corp.*, 481 F.2d 252, 254 (5th Cir. 1973)).

195. An excellent explanation of the "imputed knowledge" rule of strict liability has been described as:

The problem with strict liability of products has been one of limitation. No one wants absolute liability where all the article has to do is to cause injury. To impose liability there has to be something about the article which makes it dangerously defective without regard to whether the manufacturer was or was not at fault for such condition. A test for unreasonable danger is therefore vital. A dangerously defective article would be one which a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character*. The test, therefore, is whether the seller would be negligent if he sold the article *knowing of the risk involved*. Strict liability imposes what amounts to constructive knowledge of the condition of the product.

On the surface such a test would seem to be different than the test of 2 Restatement (Second) of Torts § 402A, Comment i., of "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it." This court has used this test in the past. These are not necessarily different standards, however. As stated in *Welch v. Outboard Marine Corp.*, where the court affirmed an instruction containing both standards:

We see no necessary inconsistency between a seller-oriented standard and a user-oriented standard when, as here, each turns on foreseeable risks. They are two sides of the same standard. A product is defective and unreasonably dangerous when a reasonable seller would not sell the product if he knew of the risks involved or if the risks are greater than a reasonable buyer would expect.

To elucidate this point further we feel that the two standards are the same because a seller acting reasonably would be selling the same product which a

a reasonable consumer purchase the product if he had complete knowledge of the danger or risks in the product? If the answer to this question is no, then liability attaches.¹⁹⁶ Thus, meaning is given to both the warranty and negligence heritage of section 402A. Both the manufacturer and consumer-oriented tests mean the same thing, but reflect this meaning from differing viewpoints. Thus, the seven-factor risk-benefit test proposed by Professor Wade presupposes scienter on the part of the manufacturer.¹⁹⁷ Almost any reasonable multifactor test may be used in the risk-benefit calculus of strict products liability as long as such calculations are premised on the imputation of knowledge of the product's risk and the danger to the manufacturer. With this proviso, strict products liability and negligence are comparable. If the risks and the benefits of a particular design are either known or could reasonably be known by the manufacturer, then the two theories are equivalent.¹⁹⁸ Yet, when the risk of the product is unknown and unknowable at the time of manufacture, the two theories deviate. Negligence will not allow liability in the unknown and unknowable situation, whereas strict liability will.¹⁹⁹ In one other situation, the two theories yield opposite results. Assume that after a product is placed on the market, an alternative design or a guard is invented that would have eliminated or reduced the plaintiff's injury caused by the original product. Under negligence law, the plaintiff could not recover, but under a strict liability theory, the manufacturer might be found liable.²⁰⁰

7. *A Possible Standard for Strict Liability in Indiana.*—The Indiana Supreme Court is on the threshold of interpreting the Indiana Products Liability Act. Interpretation will, of course, be within the confines of proper statutory construction. The language of the Act is so loosely

reasonable consumer believes he is purchasing. That is to say, a manufacturer who would be negligent in marketing a given product, considering its risks, would necessarily be marketing a product which fell below the reasonable expectations of consumers who purchase it. The foreseeable uses to which a product could be put would be the same in the minds of both the seller and the buyer unless one of the parties was not acting reasonably. The advantage of describing a dangerous defect in the manner of Wade and Keeton is that it preserves the use of familiar terms and thought processes with which courts, lawyers, and jurors customarily deal.

Phillips v. Kimwood Mach. Co., 269 Or. 485, 491-93, 525 P.2d 1033, 1036-37 (1974) (emphasis in original) (footnotes omitted).

196. Phillips, 269 Or. 491, 525 P.2d at 1036.

197. Wade, *supra* note 108, at 834. But see Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 757 (1983) ("knowledge issues contain unknowable or unforeseeable delays . . .").

198. Schwartz, *supra* note 108, at 463.

199. *Id.* at 482-88.

200. See *id.*

woven that it will allow the supreme court great latitude in its "construction." Certain basic concepts, however, are contained in the language of the Act that seems to parallel section 402A.²⁰¹ Section 3b(2) eliminates contract law, including privity, as a barrier to liability.²⁰² The definitions of "unreasonably dangerous" in section 2 and "defective condition" in section 2.5(a) seem to interact with each other by cross referencing similar to the methodology used in comments g, h, and i of section 402A.²⁰³ Although unreasonably dangerous appears to be confined to comment i of section 402A, there does not appear to be any statutory constraint to include a definitional structure outside of the comment i language.²⁰⁴ The "state of the art" defense found in section 4(b)(4) could possibly be a concession to negligence.²⁰⁵ Even assuming state of the art

201. See *supra* note 101 and accompanying text.

202. The definition section of the Indiana Products Liability Act, Indiana Code § 33-1-1.5-2, includes the following definition of "unreasonably dangerous":

"Unreasonably dangerous" refers to any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases it with the ordinary knowledge about the product's characteristics common to the community of consumers.

IND. CODE ANN. § 33-1-1.5-2 (Burns Supp. 1990).

203. The Act's description of defective products at Indiana Code § 33-1-1.5-2.5(a) states:

A product is in a defective condition under this chapter if, at the time it is conveyed by the seller to another party, it is in a condition:

(1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and

(2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.

IND. CODE ANN. § 33-1-1.5-2.5(a) (Burns Supp. 1990). It seems clear that both "unreasonably dangerous" and "defective condition" make references to each other for explanation of their meaning, which is the same methodology used in the comments of § 402A. § 402A, *supra* note 101; see *supra* note 108.

204. It appears that a court should use about any type of method it desires to develop a reasoned approach to strict liability, and it is not confined to § 402A or its methodology. See 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A. See also Montgomery & Owen, *supra* note 105 (discussion of South Carolina statutes patterned after § 402A).

205. IND. CODE § 33-1-1.5-4(b)(4) states: "When physical harm is caused by a defective product, it is a defense that the design, manufacture, inspection, packaging, warning, or labeling of the product was in conformity with the generally recognized state of the art at the time the product was designed, manufactured, packaged, and labeled." IND. CODE ANN. § 33-1-1.5-4(b)(4) (Burns Supp. 1990). If the state of the art defense, as defined in § 4(b)(4), is applied to "manufacturing" defects, then it will conflict with § 3, which provides for strict liability. It is difficult to reconcile such a conflict because even the "traditional" strict liability situations involving foods would be eliminated if the manufacturer is allowed to escape liability by offering evidence that he is using the most

as a negligence principle, its application does not prevent the implementation of strict liability in products liability systems.²⁰⁶ The other language found throughout the act that is changed from section 402A can be interpreted several ways. The use of negligence language is probably inevitable considering the tort or negligence heritage of strict liability as expressed in the history of section 402A.²⁰⁷ Thus, "negligence language" does not necessarily negate the basic tenant of section 3 — that strict liability be imposed.²⁰⁸

With the above in mind, many of the recent cases throughout the country may provide some guidance in interpreting strict liability, especially the phrase "defective condition unreasonably dangerous." The phrase has been highly debated and interpreted in almost every conceivable manner.²⁰⁹ The phrase is said to contain the two separate and distinct elements of "defect" and "unreasonable danger." Thus, proof of each is required; however, some courts require only proof of "defect,"

feasible technology in producing his product. If state of the art is confined to "design" defect situations, it could be interpreted in a very narrow and restrictive manner under the "old" views of negligence law. See Vargo & Leibman, *Products Liability: 1979 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 248-49 (1979) (review of state of the art under Indiana's 1978 Products Liability Act); Vargo, *1983 Survey of Products Liability*, 17 IND. L. REV. 255, 280-81 (1984) (harshness of the 1978 Products Liability Act is ameliorated in the 1983 amendments). Such an interpretation is said to be particularly onerous and would lead to a reason to doubt its efficacy and fairness. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521, 525 n.16 (1982) [hereinafter Twerski, *Seizing the Middle Ground*]. However, at least the Indiana Court of Appeals views the state of the art defense as more in line with a "mature" negligence system. See *Montgomery Ward & Co. v. Greg*, 554 N.E.2d 1145, 1155 (Ind. Ct. App. 1990) (interpretation of the 1978 Indiana Products Liability Act).

206. See Schwartz, *supra* note 108, at 482-88.

207. See *Montgomery & Owen*, *supra* note 105, at 807; 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A. See also *supra* note 108.

208. IND. CODE § 33-1-1.5-3(b) states:

The rule stated in subsection (a) applies although:

(1) the seller has exercised all reasonable care in the preparation, packaging, labeling, instructing for use, and sale of his product; and

(2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

IND. CODE ANN. § 31-1-1.5-3(b) (Burns Supp. 1990). Thus, it is clear that Indiana's Product Liability Act intends the imposition of liability without resort to negligence (or contract). In other words, strict liability is the desired result. This result is not changed by the alteration of the § 402A words "all possible care" to "all reasonable care" because "all reasonable care" is still considered negligence. See Vargo, *1983 Products Liability Survey*, *supra* note 205, at 279.

209. See 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A; PROSSER & KEETON, *supra* note 42, § 96; 1 J. VARGO, PRODUCTS LIABILITY PRACTICE GUIDE § 7.02 (Matthew Bender 1989) [hereinafter 1 J. VARGO].

and others require only proof of "unreasonable danger."²¹⁰ Still other courts have treated the two terms identically or define one in terms of the other.²¹¹ Some courts object to the use of the words "unreasonable danger" because the term can be interpreted to mean negligence.²¹² Much of the debate over the phrase is actually a debate between those who desire to regress to the protective atmosphere provided under older negligence principles and those who desire to afford greater consumer protection under strict liability.²¹³

If strict liability is the goal, the exact language used may not be as important as the interpretation of the standard applied to such language. The standard employed to achieve strict liability has been achieved by a variety of methods.²¹⁴ Some jurisdictions emphasize the warranty heritage of strict liability and use only the consumer expectation test as a standard.²¹⁵ However, using warranty language as the sole standard creates many problems, including application of the now discredited open and obvious danger rule.²¹⁶ Some courts have resolved the consumer expectation problem by switching from a consumer-oriented standard to a manufacturing-oriented standard; knowledge of the defect or danger in the product is imputed to the manufacturer, and the issue is resolved by asking whether the manufacturer-seller would be negligent for marketing the product.²¹⁷ The most innovative strict liability standard has been developed by courts that combine warranty and negligence principles of strict liability into a bifurcated test.²¹⁸ Under the bifurcated test, the consumer-expectation standard is applied when useful. If that standard proves troublesome, the plaintiff is allowed to use a risk-benefit balancing test.²¹⁹ California, in an attempt to keep the "strict" in strict liability, uses such a bifurcated test with the risk-benefit burden of proof placed

210. See *supra* note 209.

211. See 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A; 1 J. VARGO, *supra* note 209, § 7.02.

212. See *supra* note 209.

213. See 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A, at 582-91.

214. *Id.* § 28.15; PROSSER & KEETON, *supra* note 42, § 99; 1 J. VARGO, *supra* note 209, § 7.02.

215. See *supra* note 214.

216. See 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A; PROSSER & KEETON, *supra* note 42, § 96; 1 J. VARGO, *supra* note 209, § 7.02(1)(c). See generally *supra* notes 108, 209.

217. See PROSSER & KEETON, *supra* note 42, § 99. See also 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.15; 1 J. VARGO, *supra* note 209.

218. *Supra* note 217. See, e.g., *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 432, 573 P.2d 443, 143 Cal. Rptr. 225, 237 (1978).

219. *Supra* note 218. See generally PROSSER & KEETON, *supra* note 42, § 99; Fischer, *supra* note 108; Schwartz, *supra* note 108.

on the defendant.²²⁰ Again, if Indiana chooses strict liability, the court can pick from among many alternatives. The resolution of the type of standard must be made with an understanding that the core concept of strict liability, the risk of ignorance about the product's characteristics (danger or defect), is squarely on the manufacturer-seller.²²¹

B. The Trouble with Economics

Both negligence and strict liability have a long and rich heritage in the common law. Their development included balancing many factors that changed as society's morals and attitudes fluctuated. A recent vogue among some scholars is the examination and interpretation of tort law based solely upon economic principles.²²² Many of these economic theories of tort liability have been reduced to shorthand phrases such as "risk-benefit" analysis,²²³ "cost-benefit" analysis,²²⁴ "risk-utility" analysis, and "enterprise liability."

The probable origin of the economic analysis for tort liability is Judge Learned Hand's comments made in two cases from the 1940s.²²⁵ The dicta in these two decisions formed the basis of what has been commonly called the "risk-utility" test or the Learned Hand calculus for negligence. This risk-utility test for liability carried over into strict products liability actions.²²⁶

However, the risk-utility test has inherent difficulties. If the plaintiff only sustains property damage, the test appears acceptable because property damage can be easily reduced to monetary terms. Thus, the test balances money against money. In a personal injury case, however, the test requires balancing death and human suffering against the money necessary to prevent such events. Such a balancing process may appear acceptable to some, especially when reduced to figures on paper; however, others have moral misgivings about reducing human suffering to monetary figures and possibly determining that injury is too costly to avoid. Recent events have shown that a pure economic view of tort liability may be unacceptable.

220. *Barker*, 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

221. See 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A, at 578.

222. See, e.g., G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

223. See Wade, *supra* note 108, at 834.

224. See Epstein, *supra* note 222, at 157.

225. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); *Conway v. O'Brien*, 111 F.2d 611 (2d Cir. 1940), *rev'd*, 61 S. Ct. 634 (1941).

226. See generally, Twerski, *Seizing the Middle Ground*, *supra* note 205.

In *Grimshaw v. Ford Motor Co.*,²²⁷ the plaintiff was injured by a defectively designed Pinto. The plaintiff sought recovery for compensatory damages under strict liability for the design defect and punitive damages under a separate theory grounded on Ford's "malice" or "callous indifference to public safety."²²⁸ In its design of the Pinto, Ford followed the economic view and balanced human lives and limbs against corporate profits. The apparent cost of correcting the injury producing defect was only eight dollars per car; however, Ford determined that under a cost-benefit analysis they did not have to correct the Pinto's defective gas tank.²²⁹ The jury not only awarded compensatory damages for the defective design, but also awarded \$125 million in punitive damages. The punitive damages were reduced by the trial judge to \$3.5 million, which was upheld on appeal.²³⁰ Professors David Owen and Richard Epstein criticized the punitive damage award in *Grimshaw*;²³¹ however, Professor Gary Schwartz pointed out: "What starts out, then, as a specific complaint (by Owen and others) against the inappropriate imposition of punitive damages turns out to reveal a serious element of fallibility in the liability criterion that has been embraced by an entire generation of legal and economic scholars."²³² Judge Learned Hand also recognized the fallibility of a pure economic analysis as the legal standard for the determination of liability when he formulated the risk-utility test:

The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk. All these are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied.²³³

227. 119 Cal. App. 3d 757, Cal. Rptr. 348 (1981). For an excellent examination of *Grimshaw*, see Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 151-53 (1982) [hereinafter Schwartz, *Deterrence*].

228. *Grimshaw*, 119 Cal. App. 3d at 801 n.11, 174 Cal. Rptr. at 381 n.11.

229. *Id.* at 790, 174 Cal. Rptr. at 370.

230. *Id.* at 836, 174 Cal. Rptr. at 399.

231. See 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A, at 583 n.37.

232. Schwartz, *Deterrence*, *supra* note 227, at 153.

233. *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940), *rev'd*, 61 S. Ct. 634 (1941).

Formulating legal principles by a mathematical or economic analysis of elements that are not susceptible to either practical or theoretical quantitative estimates does not speak well of the recent trend toward economic dominance in tort law. The common law must and does take into account basic, ethical evaluations when deciding whether a certain act is tortious.²³⁴

C. State of the Art

1. *Definition of State of the Art.*—The Indiana Products Liability Act section 4(b)(4) includes state of the art as a defense.²³⁵ The Indiana Court of Appeals recently examined this defense under the 1978 act in *Montgomery Ward & Co. v. Gregg*.²³⁶ There are several possible interpretations of the term state of the art. The defendant manufacturer could assert that liability should not be assessed because it has complied with the custom or standards in its industry.²³⁷ This position effectively

234. See Schwartz, *Economics, Wealth Distribution, and Justice*, 1979 WIS. L. REV. 799, 804-08.

235. See *supra* note 196 and accompanying text. The wording of § 4(b)(4) appears at first glance to be applicable to all three types of defects — manufacturing, design and failure to warn. But application of state of the art in manufacturing defect cases eliminates strict liability, which is mandated by § 3 of the Products Liability Act. Such application would violate the “core” basis of strict liability in its simplest form. For example, injury resulting from bean-shaped rocks in baked beans always results in liability even if the manufacture is using the latest technologically feasible method of producing baked beans. By definition in manufacturing defect cases, the product has failed to conform to the manufacturer’s own standards. The issue in a manufacturing defect case, such as bean-shaped rocks in baked beans, is whether the baked beans were as the manufacturer intended them to be — without rocks. The existing technology for production of baked beans is not relevant to such an inquiry.

State-of-the-art evidence has no relevance to strict products actions involving manufacturing defects. In such cases the use or non-use of then-existing technology would have played no role in causing the plaintiff’s injury because the product, by definition, failed to conform to the manufacturer’s own standards. Similarly, no great dispute exists as to the admissibility of state-of-the-art evidence in failure to warn cases because of the express “knowledge . . . developed human skill and foresight” provision of Restatement Section 402A.

L. FRUMER & H. FRIEDMAN, § 2.26[8][d][ii][B] (Matthew Bender 1989) [hereinafter FRUMER & FRIEDMAN].

If state of the art is confined to design defect situations, it usually relates to proof of an alternative design. In proving such alternative design, state of the art is not generally considered to be the then-existing industry standards, custom, or compliance with statutes and government regulations. *Id.* § 2.26[8][b][i]. Instead, state of the art is considered what is technologically feasible. *Id.* § 2.26[8][c].

236. 554 N.E.2d 1145 (Ind. Ct. App. 1990). See IND. CODE § 33-1-1.5-4(b)(4) (Supp. 1978).

237. See *supra* note 205.

provides: We are doing what everybody else is doing, so why should we be liable? Such a position, however, is nothing less than a self-made standard of conduct that is not acceptable under general negligence principles.²³⁸ The defendant-manufacturer might also assert that its product conformed with either "independent standards" or government standards.²³⁹ This position asserts that such "independent" or government standards have set an adequate standard of conduct. Courts generally look askance at such assertions because of the defendants's heavy influence in the formulation of such standards.²⁴⁰ As a result, many courts consider both "independent" and government standards as "floors not ceilings."²⁴¹ In a mature ("new") negligence system, statutes, regulations, and codes are viewed as minimum standards of care. Under the general test of reasonableness, the common law may impose a higher standard.

The generally accepted view is that "state of the art" refers to a level of scientific or technical knowledge that the manufacturer feasibly could have implemented.²⁴² Under this definition, state of the art focuses on what the manufacturer *could do*, not on what actually is done. What could be done necessarily involves issues of knowledge and feasibility.²⁴³ The manufacturer's lack of actual knowledge is not the yardstick by which state of the art is measured. In negligence, the defendant is held to the standard of what he knew or should have known about the risks or hazards of his product.²⁴⁴ Negligence also considers a manufacturer to have the knowledge of an expert in that particular field of endeavor.²⁴⁵ However, there are circumstances in which knowledge of risk is impossible. Professor Spradley has categorized such circumstances into three major areas: undiscoverable risks, unknowable risks, and technological impossibilities.²⁴⁶

An undiscoverable risk arises when the manufacturer realizes that some of its products contain risks but it is impossible for it to identify the specific products containing the risks or hazards.²⁴⁷ This circumstance arises in manufacturing defect situations when the manufacturer asserts that it is not economically feasible to identify the products that contain

238. See 1 J. VARGO, *supra* note 209, § 6.03(8)(a).

239. *Id.* § 6.03(8)(a), (b).

240. *Id.*

241. *Id.*

242. *Id.*

243. See Robb, *A Practical Approach to Use of State of the Art Evidence in Strict Product Liability Cases*, 77 NW. U.L. REV. 1 (1982); Spradley, *Defensive Use of State of the Art Evidence in Strict Liability*, 67 MINN. L. REV. 343 (1982).

244. See PROSSER & KEETON, *supra* note 42, § 99, at 697.

245. See *Dias v. Daisy-Heddon*, 390 N.E.2d 222 (Ind. Ct. App. 1979).

246. See Spradley, *supra* note 243.

247. *Id.* at 380.

the risks or hazards. Beyond a certain point, further testing and quality control result in diminishing returns. Because it is almost impossible at any cost to discover every defect or hazard in the production line, the risk is undiscoverable.²⁴⁸

On the other hand, an unknowable risk, as the term itself implies, is one that is impossible to discover.²⁴⁹ This circumstance arises in warning defect cases when the manufacturer asserts that it was impossible to discover the risk, and because the risk itself is unknown, it is impossible to warn about. The unknowable risk differs from the undiscoverable risk because the manufacturer is aware of the undiscoverable risk and can warn about it.²⁵⁰

Closely related to an unknown risk is technological impossibility.²⁵¹ Certain technological or scientific knowledge may not exist at the time a product is designed and manufactured. For example, a radio and radar might be necessary safety items on ships to avoid storms and collisions; however, it was technologically impossible to include such items on ships designed and built in 1810.

Feasibility involves the cost of implementing existing technology.²⁵² When a manufacturer asserts a safer product is not feasible, it is not asserting that the safer product could not be produced, but instead is asserting that it would cost too much to do so. However, feasibility factors should include more than mere manufacturing costs of the alternative design. Other factors that should also be considered in addressing alternative design are whether such design would decrease the product's utility and whether it would create the same or greater risks in the product's use. Furthermore, one of the most important "costs" that must be considered is not the actual dollar costs but rather the human and social costs that accompany every product injury.²⁵³ Manufacturers rarely, if ever, consider these costs when examining a product's original or alternative design.²⁵⁴ If a manufacturer is defending its design or attacking suggested alternative designs, "the courts must encourage manufacturers to set risk levels that factor these human and social costs into the analysis."²⁵⁵

State of the art, as a negligence principle, will preclude liability when the risk is undiscoverable or unknowable and when technology does not

248. *Id.*

249. *Id.* at 389.

250. *Id.*

251. *Id.* at 398.

252. *Id.* at 411.

253. *Id.* at 415-16.

254. *Id.* at 416.

255. *Id.*

exist to make the product safer.²⁵⁶ All of these circumstances are often lumped together under the shorthand phrase of "technological feasibility." When technological feasibility and economic feasibility are combined, the definition of state of the art is complete.²⁵⁷ This generally accepted two-part definition of state of the art — technological and economic feasibility — is, in essence, the equivalent of the risk-utility standard of negligence.²⁵⁸

Resolving the definition of state of the art also requires a consideration of the time frame when it is applied: the date of design, the date of manufacture, the date of injury, or the date of trial. Using the date of the original design will result in application of antiquated standards that would not meet the requirements of negligence law.²⁵⁹ Applying the date of manufacture would meet the negligence standard whereas applying date of injury or trial is more amenable to strict liability.²⁶⁰

2. *Application of State of the Art — A Conflict with Strict Liability?*—There is no doubt that state of the art in almost any form is a negligence concept that theoretically conflicts with the application of strict liability. Thus, the Indiana Act has a built-in conflict between sections 3(b)(1) [strict liability] and 4(b)(4) [state of the art]. Section 3(b)(1) states: "(b) The rule stated in subsection (a) applies although: (1) the seller has exercised all reasonable care in the preparation, packaging, labeling, instructing for use, and sale of his product."²⁶¹ Section 4(b)(4) states: "(4) When physical harm is caused by a defective product, it is a defense that the design, manufacture, inspection, packaging, warning, or labeling of the product was in conformity with the generally recognized state of the art at the time the product was designed, manufactured, packaged, and labeled."²⁶²

The resolution of the conflict between these two sections will involve one of the following two methods of interpretation: Either the two

256. See *supra* note 243. See also Calnan, *Perpetuating Negligence Principles in Strict Products Liability: The Use of State of the Art Concepts in Design Cases*, 36 SYRACUSE L. REV. 797 (1985); Wilkinson, *Admissibility of State of the Art Defense — Manufacturer's Expertise May No Longer Be Allowed in the Court Room*, Oct. PA. B.A.Q. 205 (1988); Note, *Use of "State of the Art" Evidence in Strict Liability Claims: The New Texas Standard*, 33 BAYLOR L. REV. 165 (1981); Note, *The State of the Art Defense in Strict Products Liability*, 57 MARQ. L. REV. 649 (1974).

257. See generally Phillips, *The Standard for Determining Defectiveness in Products Liability*, 46 U. CIN. L. REV. 101 (1977).

258. See *supra* notes 243 and 256.

259. See Vargo & Leibman, *supra* note 205, at 249.

260. See *Dart v. Wiebe Mfg., Inc.*, 147 Ariz. 242, 709 P.2d 876 (1985); Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587, 633-35 (1969).

261. IND. CODE ANN. § 33-1-1.5-3(b)(1) (Burns Supp. 1990).

262. *Id.* § 33-1-1.5-4(b)(4).

sections will be interpreted as compatible or, if incompatible, one section must control and the other must be eliminated. Assuming the sections are determined to be incompatible, the issue becomes which section should be stricken. The Act as a whole places a very strong emphasis on strict liability, an emphasis that is prevalent in all sections of the Act. The titles to sections 3 and 4 indicate strict liability is to be imposed.²⁶³ Section 1 clearly indicates that the chapter governs all actions for strict liability.²⁶⁴ The definitions contained in sections 2 and 2.5 show a pattern based upon the traditional concepts of strict liability pursuant to section 402A. Section 3, with a few word changes, tracks the language of section 402A. The elimination of strict liability from the Act does not seem to be a viable alternative because nothing would remain. However, if state of the art is eliminated, the Act will remain intact with the exception of the excluded defense.

The Indiana Supreme Court will most likely take the first option and attempt to reconcile the two sections so that each may be given effect. Any interpretation of the language of section 4(b)(4) will require examination of how state of the art applies to strict liability categories of defect: manufacturing defect, design defect, and a failure to adequately instruct or warn.²⁶⁵ If section 4(b)(4) applies to manufacturing defects, it is clear that a direct conflict arises with strict liability. The only situation in which state of the art could apply to a manufacturing defect involves an "undiscoverable risk."²⁶⁶ In such situations, the defendant asserts that no manufacturing process can assure that 100% of the products produced are defect free; therefore, no liability should attach. In other words, no amount of testing or quality control can either assure defect free products or identify the particular products that will contain a defect. This argument may have application in the law of negligence; however, this situation was the very circumstance that gave rise to strict liability under section 402A in the first instance.²⁶⁷

Under strict liability, the manufacturer is held liable for manufacturing defects regardless of its inability to avoid such defects. By definition, a manufacturing defect consists of a deviation from the

263. IND. CODE § 33-1-1.5-3 Strict Liability in Tort Imposed; IND. CODE § 33-1-1.5-4 Defenses to Strict Liability in Tort.

264. IND. CODE § 33-1-1.5-1 Application of Chapter

Sec. 1. Except as provided in section 5 of this chapter, this chapter governs all actions in which the theory of liability is strict liability in tort.

265. *Hoffman v. E.W. Bliss Co.*, 448 N.E.2d 277, 281 (Ind. 1983).

266. See Spradley, *supra* note 243, at 380-88.

267. *Id.* at 384-85. If anything, § 402A was intended to eliminate negligence in manufacturing defect cases regardless of the manufacturer's lack of knowledge of the risk or of the impossibility of eliminating such risks. See *supra* note 133 and accompanying text.

manufacturer's own standard (the product actually produced is different from what the manufacturer intended).²⁶⁸ It would be nonsensical to allow a complete defense to the strict liability of a manufacturer who admits by sample that his product is defective.

The example of the rocks in the baked beans illustrates this conflict between state of the art and strict liability in manufacturing defect cases.²⁶⁹ There is no doubt that the manufacturer never intended to include rocks in the baked beans and that the rocks render the product defective. If strict liability is applied, the plaintiff who is injured by the rocks will recover. If, however, negligence is applied, the plaintiff will be deprived of recovery because the defendant will have acted reasonably under the risk-utility analysis because it was too costly or technologically impossible to discover and remove the rocks from the baked beans.²⁷⁰ If strict liability is applied and state of the art is allowed as an affirmative defense, the plaintiff will be deprived of recovery based upon the same rationales that apply in negligence situations — the defendant either could not economically remove the rocks or it was impossible for it to do so with existing technology.²⁷¹ In this situation, the circle of reasoning closes in on itself, resulting in nothing less than sophistry. This is the very reason why state of the art is not applied to strict liability manufacturing defect cases.²⁷²

In warning defect cases, state of the art involves unknowable risks and feasibility.²⁷³ The defendant asserts that it cannot warn of unknowable risks. If the risk is known, the defendant could assert that it could not feasibly transmit the warning to the user because of inordinate cost. For example, a small consumer item may not have room for all necessary warnings, and, even if a package insert or manual is included with or attached to the product, there is no way to assure that the warnings will be passed along to all potential users. The unknowable risk aspect of state of the art in warning cases has been resolved in a number of ways: courts have taken positions ranging from no liability under a negligence standard to the imposition of liability under a strict liability standard.²⁷⁴ A somewhat modified position has been taken by Professor Keeton who believes that strict liability should be applied when the risk is unknown unless the benefits of the product outweigh the harm to

268. See PROSSER & KEETON, *supra* note 42, at 694-97.

269. See *supra* § VII.A.3. through text accompanying note 136.

270. *Id.*

271. *Id.*

272. FRUMER & FRIEDMAN, *supra* note 235, § 2.26[8][d][ii][A].

273. See Spradley, *supra* note 243, at 389-40, 433-37.

274. *Id.*

the users.²⁷⁵ According to this rationale, manufacturers of beneficial products will not be held liable for the unknowable risks, but manufacturers of marginally beneficial products with insignificant utility will be liable for such risks.²⁷⁶

When the risk becomes known, the feasibility of warning remains an issue, and the risk-utility factors of negligence appear to be an integral part of the applicable analysis. The only concession to strict liability principles is that the risk-utility analysis must provide, at the very least, an expanded view of negligence when the manufacturer has a nondelegable duty to warn the ultimate user.²⁷⁷

State of the art is universally associated with design defect situations.²⁷⁸ As previously discussed, when state of the art is interpreted to mean industry, custom, or governmental standards, it is generally not accepted as the standard in negligence law. When it is thus defined, it is completely incompatible with strict liability. Thus, if section 4(b)(4) is considered to include either industry, custom, or governmental standards, a direct conflict exists.

In a design defect case, the plaintiff almost always advocates an alternative design to that which caused the injury.²⁷⁹ Because state of the art focuses on the feasibility of such alternative design, it rarely involves the unknowable risk or unknown technology.²⁸⁰ A defendant who argues against plaintiff's alternative design effectively admits that such alternative design could be technologically implemented but asserts that it is impractical to do so.²⁸¹ The case is resolved on feasibility issues concerning the alternative design presented by the plaintiff. These issues include factors such as costs, utility, and risks associated with plaintiff's proffered design.²⁸² All these feasibility issues are identical to the negligence risk-utility formula.²⁸³

However, state of the art in design cases may also involve situations in which at the time of the product's design, manufacture, and sale, the risk or hazard was unknown (unknowable risk). Thus, the manufacturer could not possibly have designed a safer product even if adequate technology existed. Finally, state of the art may involve situations in which the manufacturer knows of the risk or hazard but no technology

275. *Id.*

276. *Id.*

277. *Id.*

278. See FRUMER & FRIEDMAN, *supra* note 235, § 2.26[8][d][ii][A].

279. See *supra* notes 243 and 256.

280. See Spradley, *supra* note 243, at 416-33.

281. *Id.*

282. *Id.*

283. *Id.*

exists for its elimination (technological impossibility). In the former situation (unknowable risks), strict liability would make a difference because knowledge of the risk is imputed to the manufacturer.²⁸⁴ However, strict liability has no effect on the technological impossibility scenario, and liability would not attach under such circumstances.²⁸⁵

State of the art in design cases can be compatible with strict liability if state of the art is properly defined. If it is considered to be what is economically and technologically feasible, there are only a few differences between such definition and strict liability. If state of the art is adjusted to include imputation of the knowledge of the risk, there appears to be no conflict with strict liability. Technological impossibility only arises when such technology is discovered between the time of the product's sale and the time plaintiff proffers its alternative design.²⁸⁶ In such situations, state of the art, under both negligence and strict liability, poses no conflict because both situations preclude liability.²⁸⁷ One caveat to technological impossibility concerns the true nonexistence of technology at the time the defendant sold its product. If such technology is "discovered" within a short time after the sale, a serious question arises as to whether such technology could not have been discovered before the defendant designed and sold the product. This issue may be the primary reason why a manufacturer's later designs are admitted into evidence.²⁸⁸ If the Indiana Supreme Court can interpret section 4(b)(4) to come within the parameters of state of the art as above defined, strict liability and state of the art might coexist.

D. Crashworthiness

The Indiana Supreme Court recently approved of the crashworthiness doctrine in *Miller v. Todd*.²⁸⁹ Crashworthiness is a doctrine that allows liability against the manufacturer when the alleged defect does not cause the accident but enhances the plaintiff's injuries beyond those that would

284. See *supra* § VII.A.6. Placing liability on the manufacturer when the risk is unknown seems unfair because the manufacturer is asked to do the impossible. However, it is equally unfair to place the burden of injury on the user who is also unaware of the risk. Given two such "innocent" parties, the policy of strict liability opts for the manufacturer to bear the liability, whereas negligence does not.

285. Assuming knowledge of the risk or hazard is imputed to the manufacturer, this knowledge does not create new technology if none existed before.

286. See *supra* notes 243 and 256.

287. For an excellent explanation of the policy underlying the application of state of the art when there is no existing technology, see Schwartz, *supra* note 108, at 482-88.

288. Spradly, *supra* note 243, at 431-33.

289. 551 N.E.2d 1139, 1143 (Ind. 1990).

have been sustained absent the alleged defect.²⁹⁰ Thus, the crashworthiness doctrine cases are sometimes called "enhanced injury" or "second collision" cases.²⁹¹ Prior to *Miller*, several courts anticipated the Indiana Supreme Court's approval of the crashworthiness doctrine and adopted it. Prior to 1977, however, Indiana courts lived under the shadow of the infamous case of *Evans v. G.M.C.*²⁹² *Evans* rejected the crashworthiness doctrine on the basis of an extremely narrow view of foreseeability²⁹³ that harkened back to the archaic negligence concept of unintended use originating in *Sandefur*.²⁹⁴

The *Miller* court's adoption of crashworthiness confirmed the rejection of antiquated negligence concepts. The court did not answer the issue of the burden of proof concerning damages in an enhanced injury case. Does the plaintiff or the defendant have the burden of proving what injuries would result if the manufacturer designed a safer or nondefective product?²⁹⁵ This issue has been addressed in two recent Indiana Court of Appeals decisions: *Masterman v. Veldman's Equipment, Inc.*²⁹⁶ and *Jackson v. Warrum*.²⁹⁷ In *Masterman*, the third district decided that the plaintiff had the burden of proof,²⁹⁸ but in *Jackson* the first district determined that it was the defendant's burden of proof.²⁹⁹ The Indiana Supreme Court must decide between these two conflicting court of appeals decisions. Again, the Indiana Supreme Court's decision will depend on the court's determination of whether Indiana law is to be ruled by strict liability or negligence principles. If strict liability is chosen, the Indiana Supreme Court will likely follow the reasoning of *Jackson* in which the court said that products liability law has never required the plaintiff to prove a negative.³⁰⁰

VIII. CONCLUSION

Under current Indiana law, the open and obvious danger rule is only applicable in products negligence actions; it is inapplicable in other

290. *Id.* See also 1 J. VARGO, *supra* note 209, §§ 6.04(8), 7.02(i)(m).

291. 1 J. VARGO, *supra* note 209, § 6.04(8), 7.02(i)(m).

292. 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966).

293. *Id.* at 825.

294. See Vargo, 1976 *Products Liability Survey*, *supra* note 87.

295. This issue was recently discussed in Rosiello & Klein, *Survey of Recent Developments in Indiana Law: Products Liability*, 23 IND. L. REV. 617, 622-25 (1990).

296. 530 N.E.2d 312 (Ind. Ct. App. 1988).

297. 535 N.E.2d 1207 (Ind. Ct. App. 1989).

298. 530 N.E.2d at 317.

299. 535 N.E.2d at 1216. See also Rosiello & Klein, *supra* note 295, at 622-24.

300. 535 N.E.2d at 1218 (quoting *Mitchell v. Volkswagenwerk, D.G.*, 669 F.2d 1199 (8th Cir. 1982)). See also Rosiello & Klein, *supra* note 295, at 625.

types of negligence law. Examination of the history of the open and obvious danger rule leads to a conclusion that no justification exists for giving less protection in products negligence actions than the protection afforded plaintiffs in nonproducts negligence actions. Even the exclusion of the open and obvious danger rule from strict liability does not support any type of rationale for its inclusion in products negligence cases.

This apparent conflict for application of the open and obvious danger rule reveals very deep-rooted problems concerning Indiana's tort law and its future in areas of negligence and products liability. The rule born and nurtured by outdated negligence concepts has, until recently, crippled Indiana's progress into more mature and well-reasoned decisions.

The present Indiana Supreme Court has taken great strides in providing consumer protection, and should eliminate the open and obvious danger rule in all situations. The resolution of the dilemma presently confronting the Indiana Supreme Court is not as important as recognizing how the dilemma was created. The court is on the threshold of interpreting the Act. The Act apparently does not place any great obstacles in the court's path because its language allows great latitude for broad interpretation. The Act may reflect and use both warranty and negligence language, as does section 402A, and this type of language is to be expected considering the heritage of strict liability.

The recent expansion of liability in both negligence and products liability has prompted heavy criticism from manufacturers, their insurance companies, scholars, and attorneys who represent manufacturers.³⁰¹ Professor Oscar Gray's recent revision to the Harper and James torts treatise appears quite appropriate:

It has been suggested, for instance, that the reasonableness of "conscious design choices" is fundamentally nonjusticiable because it involves complex trade-offs that cannot all be fairly evaluated simultaneously by juries. Some difficult cases do indeed

301. In his treatise, Professor Oscar Gray recently discussed the testimony of others before Congress on proposed Products Liability Legislation:

In addition to their academic affiliations, these witnesses identified themselves as follows: Professor Birnbaum, as "of counsel to the New York firm of Skadden, Arps, Slate, Meagher & Flom, where I represent manufacturers and other defendants in product liability cases. I speak today both as a professor of law and as a practicing attorney," . . . ; Professor Fleming, as speaking "for the industrial liability council of the California Manufactures Association," . . . ; Professors Henderson and Owen, as members of the legal consulting firm of Keeton, Owen & Henderson. . . ; Professor Henderson also identified himself as "consultant to the National Product Liability Council, an association of manufacturers," although he, like Professor Owen, testified on his own behalf as a legal academic.

5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A, at 588-89 n.51.

exist. That the reader may question whether they were correctly decided does not, however, establish that they were incapable of being decided correctly. Whatever the merits of the suggestion that issues which can be fairly characterized as, *e.g.* "polycentric," should be regarded as nonjusticiable, it is by no means clear that most design decisions are fairly so characterized.

On a number of other grounds it has similarly been contended that strict products liability has become somehow unworkable. Complaints have been conspicuous, for instance, about liability for injuries caused by the failure of products that were made and sold many years earlier, and about strict liability imposed on retailers who have no way to inspect or test the products they sell. These, and questions raised about liability for hazards the existence of which, or the means for the correction of which, were purportedly unknowable, have led to numerous proposals for legislative modification of strict liability at both state and federal levels. Such changes have been supported by prominent scholars and practitioners. Yet, with the greatest respect to them, it may be suggested that the alarms are on the whole premature and exaggerated, the proposed solutions unpersuasive in the aggregate and generally retrogressive.³⁰²

The Indiana Supreme Court's response to the critics of expanding liability and the court's resolution of issues such as state of the art, burden of proof in crashworthiness, and determination of a standard for "defective condition unreasonably dangerous" will determine whether Indiana will be confronted with new dilemmas similar to those created by the open and obvious danger rule, or will proceed to establish reasonable rules for products liability actions.

302. *Id.* § 28.32A, at 584-89.

Recent Developments In Tort Law*

GERI J. YONOVER**

I. INTRODUCTION

During the survey period, late spring 1989 through late summer 1990, there have been a number of significant developments in tort law. The judiciary has been responsible for most of them. The Indiana Supreme Court examined the scope of liability of a children's center for a sexual attack upon one of its patients,¹ crafted the boundaries of premises liability² and incurred risk,³ and refused to recognize a child's cause of action for loss of consortium when the child's parent is injured due to the negligence of a third party.⁴ In several cases, the Indiana appellate court and Seventh Circuit further refined the public policy exception to at-will employment discharge articulated by earlier decisions of the Indiana Supreme Court.⁵ The Indiana Court of Appeals also addressed the reach of the Indiana Medical Malpractice Act,⁶ adopted the tort of wrongful life,⁷ and rejected efforts to make "enjoyment of life" a separate element of damages.⁸

The Indiana General Assembly enacted several provisions relating to tort law. The legislature enhanced civil penalties for unfair claim settlement practices by insurers⁹ and required the insurance commissioner to publish figures showing the ratio of valid consumer complaints lodged against companies weighed by direct premiums earned in Indiana.¹⁰ The legislature also enacted provisions that permit persons "adversely af-

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1. *Stropes v. Heritage House Children's Center*, 547 N.E.2d 244 (Ind. 1989).

2. *Douglas v. Irvin*, 549 N.E.2d 368 (Ind. 1990).

3. *Get-N-Go, Inc. v. Markins*, 544 N.E.2d 484 (Ind. 1989), *reh'g on other grounds*, 550 N.E.2d 748 (Ind. 1990).

4. *Dearborn Fabricating & Eng'g Corp. v. Wickham*, 551 N.E.2d 1135 (Ind. 1990).

5. See *infra* notes 73-121 and accompanying text.

6. IND. CODE ANN. § 16-9.5-9-2 (West Supp. 1990). See *infra* notes 122-43 and accompanying text.

7. *Cowe v. Forum Group, Inc.*, 541 N.E.2d 962 (Ind. Ct. App. 1989).

8. See *infra* notes 156-70 and accompanying text.

9. Pub. L. No. 149-1990 (codified at IND. CODE ANN. § 27-4-1-6(a)(1) (West Supp. 1990)).

10. *Id.* § 27-4-1-19.

fecteds" by an unfair claim settlement practice to file a complaint with the insurance commissioner and that require the commission to respond promptly to the complainant and deliver it to the insurer if he or she believes the unfair practice has occurred.¹¹

The Indiana General Assembly also provided that the attorney general defend a public school teacher if the attorney general determines that the suit arises from "an act that the teacher in good faith believed was within the scope of the teacher's duties in enforcing discipline policies"¹² Additionally, the legislature enacted a "guest statute" for owners/occupiers of agricultural land, which provides that if the owner/occupier allows gratuitous use of the land to glean agricultural products, then an injured person can recover only when the injury results directly from gross negligence or willful, wanton misconduct.¹³ Lastly, the Assembly immunized from civil liability certain persons who provide information during investigations of judicial candidates to the judicial nominating commission if that information is relevant, is an expression of opinion, or is a statement of fact made without knowledge of the statement's falsity or reckless disregard of the truth.¹⁴

This Article will focus on the decisions of the Indiana Supreme Court and appellate courts in the areas indicated above. Also included is an analysis of the remarkable non-development of Indiana Civil RICO. This is somewhat surprising because RICO frequently is correlative to commercial tort claims.

II. LOSS OF PARENTAL CONSORTIUM

When a tortfeasor negligently kills a parent, and the child sues for wrongful death, many states, including Indiana, recognize the child's recovery for loss of affection and society.¹⁵ However, when a tortfeasor negligently injures a parent, only eight states (since 1980) permit a minor child to recover for loss of parental consortium.¹⁶ In *Dearborn Fabricating*

11. *Id.* § 27-4-1-5.5.

12. Pub. L. No. 16-1990 (codified at IND. CODE ANN. § 4-6-2-1.5 (West Supp. 1990)).

13. Pub. L. No. 217-1989 (codified at IND. CODE ANN. § 34-4-12.9 (West Supp. 1990)).

14. H.E.A. No. 1027 (codified at IND. CODE ANN. § 33-2.1-4-16 (West Supp. 1990)).

15. See, e.g., *Andis v. Hawkins*, 489 N.E.2d 78, 82 (Ind. Ct. App. 1986).

16. *Hibpshman v. Prudhoe Bay Supply*, 734 P.2d 991 (Alaska 1987); *Villareal v. State Dep't of Transp.*, 160 Ariz. 474, 774 P.2d 213 (1989); *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981), *overruled by* *Audubon-Exira v. Illinois Cent. Gulf R.R.*, 335 N.W.2d 148 (Iowa 1983); *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E.2d 690 (1980); *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981); *Hay v. Medical Center*

& *Engineering Corp. v. Wickham*,¹⁷ the Indiana Supreme Court joined the majority of jurisdictions that refuse to recognize a child's loss of parental consortium claim. In *Dearborn*, William Wickham's children sought relief based on the loss of the "services, society, and companionship of their father."¹⁸ The court of appeals refused to dismiss this claim. The appellate court reasoned that damages for loss of parental consortium are neither more speculative nor more difficult to assess than awards for lost spousal consortium or for pain and suffering in general, which are customarily recoverable in Indiana.¹⁹ The court also concluded that the other arguments advanced in support of denial of a child's parental consortium claims — (1) multiplicity of and protracted litigation; (2) rise in insurance premiums; (3) deference to the legislature; and (4) possible double recovery — were similarly unpersuasive.²⁰

Subsequent to the appellate court decision in *Dearborn*, two judges on a different panel of the Third District Court of Appeals reached a contrary conclusion. In *Barton-Malow Co. v. Wilburn*,²¹ Judges Hoffman and Shields declined to follow *Dearborn*,²² stating that it is within the province of the legislature to weigh the benefits of a child's parental consortium cause of action against other societal concerns.²³ In particular, the judges noted that although the legislature had recognized a child's loss of parental consortium in a wrongful death action,²⁴ it had not enacted a companion action for the same loss when the parent is injured.²⁵ Although the judges conceded that the omission could have been an oversight, they believed that the legislature made a deliberate choice. Based upon their interpretation of legislative intent and the fact that

Hosp., 145 Vt. 533, 496 A.2d 939 (1985); *Ueland v. Reynolds Metals Co.*, 103 Wash. 2d 131, 691 P.2d 190 (1984); *Theama v. City of Kenosha*, 117 Wis. 2d 508, 344 N.W.2d 513 (1984). See generally Gerse, *Compensating the Child's Loss of Parental Love, Care, and Affection*, 1983 U. ILL. L. REV. 293; Note, *Recovery for Lost Parental Consortium: Nightmare or Breakthrough*, 9 NOVA L.J. 183 (1984); Note, *Loss of Parental Society*, 17 SUFFOLK U.L. REV. 777 (1983); Annotation, *Child's Right of Action for Loss of Support, Training, Parental Attention, or the Like, Against a Third Person Negligently Injuring Parent*, 11 A.L.R.4TH 549 (1982).

17. 551 N.E.2d 1135 (Ind. 1990).

18. *Dearborn*, 532 N.E.2d 16 (Ind. Ct. App. 1988), *rev'd*, 551 N.E.2d 1135 (Ind. 1990).

19. *Id.* at 17.

20. *Id.* at 17-18. For a discussion of the appellate court decision, see Talley, *Survey of Recent Developments in Tort Law*, 23 IND. L. REV. 583, 610-12 (1990).

21. 547 N.E.2d 1123 (Ind. Ct. App. 1989), *vacated in part, aff'd in part*, 556 N.E.2d 324 (Ind. 1990).

22. Judge Staton dissented. See *id.* at 1128 (Staton, J., dissenting).

23. *Id.* at 1126-27.

24. IND. CODE ANN. § 34-1-1-2 (West Supp. 1990).

25. *Barton-Malow*, 547 N.E.2d at 1127.

the vast majority of courts that have considered the issue have denied a child's parental consortium claim, the judges concluded that the judiciary should not create a cause of action for loss of parental consortium due to tortious injury by a third party.²⁶

Unlike the *Barton-Malow* view that would leave the question to legislative resolution, the Indiana Supreme Court in *Dearborn* believed the consortium issue "to be entirely appropriate for judicial determination,"²⁷ and proceeded to address the arguments urging recognition of such damages. One of the strongest arguments favoring the adoption of a parental consortium cause of action based on negligent injury, ultimately rejected by the court, is that similar damages are usually allowed for analogous claims. Such claims, already recognized in Indiana, include those brought by a parent to recover damages for loss of a child's services, society, and companionship;²⁸ those brought by a wife²⁹ or husband³⁰ for loss of consortium (whether as a result of death or injury); and those brought by a child for the wrongful death of a parent.³¹ It seems logical that relationship losses suffered by a child when a parent is negligently injured should be afforded comparable treatment. As has been stated: "A child has a moral and should have a legal right to receive parental love and affection, discipline, and guidance, and how to grow to maturity in a home environment which enables . . . develop[ment] into a mature and responsible adult."³² Continuity of relationships, surroundings, and environmental influence are essential to a child's normal development.³³

The Indiana Supreme Court was not persuaded by *Dearborn's* attempt to distinguish spousal and parental consortium claims by emphasizing the childbearing and sexual relations aspects of spousal consortium not present in the parent/child relationship. It observed, appropriately, that other relational elements — "love, companionship, affection, society, comfort, services and solace" — are present both in spousal and parent/child relationships.³⁴ Nor was the court entirely swayed by *Dearborn's* emphasis on the dangers of multiplicity of actions and substantial increase of liability, although it did note that the remedy of joinder of the child's

26. *Id.* at 1129.

27. *Dearborn*, 551 N.E.2d at 1136.

28. *School City of Gary v. Claudio*, 413 N.E.2d 628 (Ind. Ct. App. 1980), *rev'd*, 448 N.E.2d 1212 (Ind. 1983).

29. *Troue v. Marker*, 253 Ind. 284, 252 N.E.2d 800 (1969).

30. *Burk v. Anderson*, 232 Ind. 77, 109 N.E.2d 407 (1952).

31. IND. CODE ANN. § 34-1-1-2 (West Supp. 1990).

32. Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 347 (1972).

33. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* 30-32 (2d ed. 1979). Cf. FLA. STAT. ANN. § 23.131 (West 1983).

34. *Dearborn*, 551 N.E.2d at 1137.

claims with the injured parent's claim might be affected by the Indiana provision tolling the statute of limitations during minority.³⁵ Additionally, the court recognized that a child's recovery for psychological or medical expenses (which are not consortium damages) incurred as a proximate result of tortious injury to a parent is not precluded by its opinion,³⁶ thus admitting that there is already present a "multiplicity of litigation and increased liability" phenomenon.³⁷

The Indiana Supreme Court based its rejection of a child's loss of consortium claim primarily upon "the potential harm to the family which may be generated in children's actions for loss of consortium."³⁸ The court expressed concern that defendants, faced with such claims, would seek to undermine and devalue the parent/child relationship in order to escape or to reduce liability, and these efforts would cause significant emotional harm to loving children.³⁹ The court recognized that this, indeed, might also occur when a parent seeks loss of society caused by tortious injury to a child, but noted that such attacks were directed primarily at the parent, rather than at the child.⁴⁰ However, this may be an empty distinction. In either situation, whether it is a parent seeking damages for loss of a child's consortium (customarily allowable), or a child seeking damages for loss of parental consortium, it is the *relationship* that will be the focus of a defendant's attack.⁴¹ It would seem, therefore, that the potential emotional distress that a child may suffer is the same in either situation. In fact, the court acknowledged that its attempted distinction has not been applied to preclude a child's claim for loss of consortium under Indiana's Wrongful Death Act.⁴²

35. *Id.* (citing IND. CODE ANN. § 34-1-2-5 (West 1983)). Of course, the roadblock to joinder could be removed by enactment of a uniform limitations period both for the parent's personal injury action and for the minor's action for loss of consortium. See *Salin v. Kloempken*, 322 N.W.2d 736, 740 (Minn. 1982).

36. *Dearborn*, 551 N.E.2d at 1139 n.2.

37. *Id.*

38. *Id.* at 1137.

39. *Id.*

40. *Id.* at 1137-38.

41. In fact, even in spousal loss of consortium claims, the quality of the relationship is examined. See, e.g., *Planned Parenthood of Northwest Ind. v. Vines*, 543 N.E.2d 654, 657 (Ind. Ct. App. 1989) (that married couple was temporarily separated goes to the issue of damages).

42. *Dearborn*, 551 N.E.2d at 1138 (citing IND. CODE ANN. § 34-1-1-2 (West Supp. 1990)). As stated by the Arizona Supreme Court in *Villareal v. State Dep't of Transp.*, 160 Ariz. 474, 479, 774 P.2d 213, 218 (1989): "[O]ften death is separated from severe injury by mere fortuity . . . both may cause a deleterious impact on the quality of consortium. It would be inconsistent to allow recovery for loss of consortium resulting from death but to deny recovery when the loss results from severe injury."

Nevertheless, the court attempted to distinguish the two causes of action. The first distinction is based upon the rationale of wrongful death statutes. At common law, the heirs of a decedent did not have a cause of action against the tortfeasor.⁴³ Wrongful death statutes remedied the perceived injustice of permitting a tortfeasor who negligently killed someone to escape liability entirely, thus providing an incentive to "finish off" the injured victim. Yet, the court noted that when a parent is injured, the tortfeasor does not entirely escape liability because the injured victim has a cause of action for his or her injuries. The child's claim is not essential to closing the escape-of-all-liability loophole.⁴⁴

The second distinction drawn by the Indiana Supreme Court between a claim based on a parent's death and one based on the parent's injury relates again to the function of wrongful death actions. Wrongful death suits, stated the court, are "the only means by which a family unit can recover compensation for the loss of parental care and services when a parent is tortiously killed."⁴⁵ When the parent is negligently injured, but lives, "the child's loss can be compensated in the parent's *own* cause of action."⁴⁶ But this may not necessarily be so. It is at least conceivable that a relatively minor injury to the parent may occasion a far greater consortium loss to a child of tender years. The child's recovery for loss of parental consortium is distinct from the parent's recovery of, for example, lost wages, which provides for the child's economic, but not emotional, deprivation.⁴⁷

Nonetheless, *Dearborn* precludes a child's recovery for loss of parental consortium based upon injury, but not upon death of the parent. Indiana thus remains in the majority of states that have denied recovery to a child's parental consortium claim.⁴⁸

III. LIABILITY OF CHILD-CARE CENTERS

The prevalence of child abuse in this country is staggering.⁴⁹ When it occurs within the family home setting and is reported, social agencies

43. The first inroad was Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846), which allowed recovery to the families of persons killed by tortious conduct. All states now have wrongful death statutes. See S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* (2d ed. 1975).

44. *Dearborn*, 551 N.E.2d at 1138.

45. *Id.*

46. *Id.* (emphasis supplied) (citing *Borer v. American Airlines*, 19 Cal. 3d 441, 452, 563 P.2d 858, 866, 138 Cal. Rptr. 302, 310 (1977)).

47. See, e.g., *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E.2d 690 (1980); *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981).

48. See *supra* note 16.

49. See generally NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, *CHILD SEXUAL ABUSE: LEGAL ISSUES AND APPROACHES* (rev. ed. 1981).

and the criminal justice system become involved. Somewhat more infrequently and with varying success, victims of child abuse sue their parent-victimizers in tort.⁵⁰ When child abuse occurs in an institutional setting, questions arise concerning the liability of the institution based on the conduct of one of its employees.

In its recent opinion, *Stropes v. Heritage House Childrens Center*,⁵¹ the Indiana Supreme Court held that victims of child abuse may proceed under two theories: respondeat superior and non-delegable duty. *Stropes* involved a sexual attack upon a fourteen-year-old by a male nurse's aide employed by the center. Plaintiff had cerebral palsy, severe mental retardation, and he had the mental capacity of a five-month-old infant with insufficient verbal and motor skills to assist in his own sustenance or hygiene. He was placed into the custodial care of the center as a ward of the county welfare department. While performing the usual tasks of feeding, bathing, and changing the plaintiff's clothing, the nurse's aide got into bed with him and performed both oral and anal sex on him. In the complaint filed against the aide and the center, *Stropes* claimed that the center was responsible for these sexual acts committed by the aide while on duty.

The appellate court agreed with the trial court that judgment in favor of the center was appropriate.⁵² The Indiana Supreme Court reversed the dismissal of the claims and remanded the case for trial. The court concluded that respondeat superior may apply even when the complained-of conduct is engaged in to satisfy the perpetrator's personal desires.⁵³ A per se determination that sexual assaults are outside the scope of employment

would draw an unprincipled distinction between such assaults and other types of crimes which employees may commit in response to other personal motivations, such as anger or financial pressures. Rather, the nature of the wrongful act should be a consideration in the assessment of whether and to what extent [the aide's] acts fell within the scope of his employment such that [the center] should be held accountable.⁵⁴

50. See, e.g., *Hildebrand v. Hildebrand*, 736 F. Supp. 1512 (S.D. Ind. 1990) (predicting that Indiana would not apply the discovery rule to toll the statute of limitations when injury stems from alleged physical and sexual abuse of minor by a parent). But cf. *Barnes v. Barnes*, 566 N.E.2d 1042 (Ind. Ct. App. 1991) (parental immunity precludes recovery by daughter who alleged rape and assault by her father when she was 15 years old).

51. 547 N.E.2d 244 (Ind. 1989).

52. *Stropes v. Heritage House Childrens Center*, 531 N.E.2d 250 (Ind. Ct. App. 1988) (unpublished opinion).

53. *Stropes*, 547 N.E.2d at 249.

54. *Id.*

The court held that the jury should determine whether the facts suggest that the aide acted to further the employer's business.⁵⁵ Of particular note in this case is that the aide engaged in fully authorized conduct (undressing and redressing the victim) immediately prior to and after the sexual attack. This was but one factor for a jury to consider in ascertaining the scope of employment issue.⁵⁶

The court found plaintiff's second theory of recovery based on non-delegable duty similarly viable. The court noted that the non-delegable duty inquiry differs from the respondeat superior analysis in that the focus of the respondeat superior determination is on the significant relationship between employer and employee. The court further stated that the "imposition of [vicarious] liability is premised on the control that the one may exercise over the other."⁵⁷ In contrast, the court observed that the non-delegable duty determination focuses upon the significant relationship between carrier (custodial center) and passenger (patient-resident) and stated that the "imposition of liability is premised on the control that is surrendered to the one by the other."⁵⁸

The effect of *Stropes* can only be beneficial. It will encourage those who assume the care of individuals most in need of care to provide close supervision of employee/care-givers. The willfulness of the servant will not automatically bar imposition of liability under either respondeat superior or non-delegable duty theories.

IV. LANDOWNER'S LIABILITY

The Indiana Supreme Court delineated the boundaries of premises liability and incurred risk in two recent cases during the survey period. In *Get-N-Go, Inc. v. Markins*,⁵⁹ the court considered whether a general awareness of potential harm amounts to incurred risk when 1) there is no reasonable opportunity to extricate oneself or 2) there is a real inducement to continue despite the danger. In both instances, the court found no incurred risk.⁶⁰

55. *Id.* at 249-50.

56. *Id.*

57. *Id.* at 254.

58. *Id.*

59. 544 N.E.2d 484 (Ind. 1989), *reh'g on other grounds*, 550 N.E.2d 748 (Ind. 1990).

As this Article went to press, the Indiana Supreme Court handed down a case which held that social guests are invitees, rather than licensees, and therefore are entitled to a duty of reasonable care from landowners. *Burrell v. Meads*, 59 U.S.L.W. 2642 (Ind. Apr. 10, 1991) (No. 92503-9104-CV-287). This significant case will be discussed more thoroughly in the 1991 survey.

60. *Get-N-Go*, 544 N.E.2d at 487-88.

Get-N-Go involved a slip and fall accident in defendant's parking lot. On a wintry, icy day Markins, an elderly diabetic, walked to the convenience store where she normally shopped. She fell, injuring her knee. At trial, conflicting evidence was presented concerning the extent and timing of plaintiff's awareness of the icy conditions outside defendant's store. The jury found for the plaintiff, but the court of appeals reversed, holding that Markins had incurred the risk of her injuries.⁶¹ The Indiana Supreme Court vacated this decision and affirmed the judgment of the trial court. The court noted that plaintiff's actions were not entirely voluntary: she did not become aware of the specific risk until exposure to it and chose to continue because she was so close to the store and needed the food to avoid an adverse insulin reaction.⁶² The supreme court held that these facts, determined by the jury to be in Markins's favor, do not amount to incurred risk such that the store is relieved of liability.⁶³

In *Douglas v. Irvin*,⁶⁴ the court weighed the comparative knowledge of invitee and landowner in assessing whether the landowner breached its duty of care. The court overruled language in prior cases suggesting an independent "equal or superior knowledge" rule as a limitation on the initial existence of the landowner's duty of care.⁶⁵ *Douglas v. Irvin*⁶⁶ involved a man who had been contacted by police when the police were investigating a burglar alarm at the man's neighbor's house. While at the neighbor's residence, and in darkness because of a power failure, the man stumbled over a plant and fell into a floor-level hot tub. Sometime prior, the defendant homeowner had shown the man the new hot tub room. Defendant claimed that the "equal or superior knowledge" rule requires a plaintiff to provide proof of a landowner's superior knowledge before a duty of care even arises.⁶⁷ The court disagreed. Relying on section 343 of the Restatement of Torts,⁶⁸ the court noted that the comparative knowledge of landowner and invitee is not a factor in the duty analysis; rather, it is properly considered only in the second step of a negligence inquiry — breach of duty.⁶⁹ Thus, if "a landowner knows of a condition involving a risk of harm to an invitee, but could reasonably expect the invitee to discover, realize, and avoid such risk,"⁷⁰

61. *Id.* at 486.

62. *Id.* at 487.

63. *Id.* at 487-88.

64. 549 N.E.2d 368 (Ind. 1990).

65. *Id.* at 371.

66. 549 N.E.2d 368.

67. *Id.* at 369.

68. RESTATEMENT (SECOND) OF TORTS §§ 343, 343A(1) (1965).

69. *Douglas*, 549 N.E.2d at 370.

70. *Id.*

then plaintiff may well fail to prove breach of the duty. Further, the court distinguished the objective standard used to evaluate the landowner's knowledge for purposes of breach of duty from the subjective analysis used in evaluating the invitee's actual knowledge.⁷¹ These separate inquiries conceivably could result in finding a breach of duty on the part of the landowners, yet imposing no liability because plaintiff's actual knowledge and appreciation of the specific risks would establish a defense of incurred risk.⁷²

After *Get-N-Go* and *Douglas*, a successful premises liability case looks like this: Plaintiff must plead and prove that (1) the landowner owes a duty to the invitee to keep the premises reasonably safe; and (2) defendant breached that duty and caused injury by not possessing knowledge of the harm that a reasonably prudent person would have (objective standard). If, however, defendant can show that plaintiff's knowledge of the specific risks actually were equal or superior to that of defendant (subjective standard), then defendant would not be liable.

V. EMPLOYMENT TORTS

Indiana remains an "employment at-will" state. As a general proposition, an employee at-will may be discharged at any time for any reason or for no cause at all without triggering employer liability.⁷³ But "'generally' . . . is not always."⁷⁴

Between 1959 and 1978, Indiana was one of a few vanguard states⁷⁵ to carve out exceptions to the employment at-will doctrine.⁷⁶ In *Frampton v. Central Indiana Gas Co.*,⁷⁷ the Indiana Supreme Court crafted a public policy exception to the employment at-will doctrine: an employer could not discharge an employee solely because of the employee's exercise of a statutory right.⁷⁸ In *McClanahan v. Remington Freight Lines*, the court further defined the limits of the public policy exception by holding

71. *Id.*

72. *Id.*

73. See *Ryan v. J.C. Penney Co.*, 627 F.2d 836 (7th Cir. 1980) (applying Indiana law); *Mead Johnson & Co. v. Oppenheimer*, 458 N.E.2d 668 (Ind. Ct. App. 1984).

74. *Hamann v. Gates Chevrolet*, 910 F.2d 1417, 1418 (7th Cir. 1990).

75. See, e.g., *Petermann v. Local 396, Int'l Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *Kelsay v. Motorola*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

76. Today, a clear majority of states articulate some form of contract or tort theory as a basis for rejecting the strict at-will rule. See generally H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW & PRACTICE* (2d ed. 1987). For a 1989 overview, see *Employment-At-Will: A 1989 State-By-State Survey* (Nat'l Employment Law Institute).

77. 260 Ind. 249, 297 N.E.2d 425 (1973).

78. *Id.* (discharge of employee for filing workers compensation claim violates public policy).

that public policy prohibits an employer from discharging an at-will employee in retaliation for the employee's refusal to commit an illegal act for which the employee would be personally liable.⁷⁹ In a series of cases, discussed below, decided during the survey period, both Indiana and federal courts examined the boundaries of these decisions. The cases involved plaintiffs who urged an extension or a broad reading of *Frampton* and *McClanahan*, and defendants who urged the courts to narrowly confine *Frampton*'s articulation of the public policy statutory exception and *McClanahan*'s "refusal to act illegally"⁸⁰ retaliatory discharge exception. On balance, it appears that defendants have been more successful.

*Smith v. Electrical System Division of Bristol Corp.*⁸¹ involved discharge of an employee, allegedly in retaliation for pursuing workers' compensation benefits. Smith had been an employee of Bristol for approximately eight months. After her on-the-job injury, she applied for and received workers' compensation benefits. Bristol allowed a medical leave of absence for almost two years. Bristol then terminated Smith's employment pursuant to its absence control policy contained in its employees' manual.⁸² Subsequently, Smith sued Bristol for wrongful discharge.

In affirming the grant of summary judgment to the employer, the Indiana appellate court stressed that *Frampton*'s prohibition against retaliatory discharge was really quite narrow: it applies only when the discharge is "solely because of the employee's exercise of a statutory right."⁸³ The court noted that Smith claimed that her employer indirectly penalized her exercise of workers' compensation rights because the absence control policy discouraged application for fear of discharge. In reply, Bristol argued that its absence policy was non-discriminatorily applied: whether due to illness, employment-related injury, or non-employment-related injury, excessive absence of an employee results in termination of employment.

The court concluded that no penalty was directed at Smith's workers' compensation claim. In the court's view, Bristol penalized Smith for excessive absence.⁸⁴ The discharge would have occurred even if she had chosen to take an unpaid leave, instead of availing herself of workers' compensation benefits.⁸⁵ Thus, reasoned the court, the discharge did not

79. 517 N.E.2d 390 (Ind. 1988).

80. *Hamann v. Gates Chevrolet*, 910 F.2d 1417 (7th Cir. 1990).

81. 557 N.E.2d 711 (Ind. Ct. App. 1990).

82. *Id.* at 712.

83. *Id.* (emphasis added).

84. *Id.* at 713.

85. *Id.*

result "solely" from her exercise of a statutory right.⁸⁶ *Frampton* should not be extended to prohibit what is, in essence, "a neutral policy effecting an incidental detriment . . . to receiving work[ers'] compensation."⁸⁷

Defendant was successful in reining in the applicability of *Frampton* in another case. In *Lawson v. Haven Hubbard Homes, Inc.*,⁸⁸ an employee alleged that, in violation of *Frampton*, she was terminated in retaliation for filing unemployment compensation benefits.⁸⁹ Lawson claimed that she had a right to file for unemployment benefits when her employer refused to permit her to return to work following a medical leave. Upon refusal of re-employment, Lawson applied for these benefits and contended that the employer then fired her. She argued that the employer did exactly what *Frampton*'s public policy exception forbids: induced her to forego statutory benefits by firing her when she applied for them.

The Indiana Court of Appeals did not find Lawson's reliance on *Frampton* persuasive. The court noted that *Frampton*'s underlying rationale — "fear of discharge hav[ing] a deleterious effect on the exercise of a statutory right"⁹⁰ — simply was inapplicable to the *Lawson* facts because an employee does not file an unemployment compensation claim unless he or she is unemployed or unless, as here, the employer refuses to allow the employee to return to work. In either situation, so long as the employee comports with the statutory requirements,⁹¹ the employee obtains unemployment benefits. Thus, the court reasoned, the employer's actions did not induce Lawson to forgo statutory benefits. The court stated,

If Lawson files for unemployment benefits because her Employer unjustifiably refuses to allow her to return to work, she has not voluntarily left her employment without good cause and she will receive benefits. If she files a claim for unemployment benefits and her Employer fires her in retaliation, she has not been discharged for "just cause" and again, she will receive benefits.⁹²

86. *Id.* Cf. *Peru Daily Tribune v. Shuler*, 544 N.E.2d 560, 563-64 (Ind. Ct. App. 1989) (when no records indicating substandard performance and discharge followed filing of workers compensation claim, the jury could reasonably find a wrongful discharge).

87. *Smith*, 557 N.E.2d at 713.

88. 551 N.E.2d 855 (Ind. Ct. App. 1990).

89. *Id.*

90. *Id.* at 860 (quoting *Frampton*, 260 Ind. 249, 251, 297 N.E.2d 425, 427 (1973)).

91. IND. CODE ANN. § 22-4-15-1 (West Supp. 1990) requires, for eligibility, that a claimant have voluntarily left employment with good cause or have been discharged without just cause.

92. *Lawson*, 551 N.E.2d at 860 (affirming grant of summary judgment to defendant, but denying defendant's request for attorney's fees pursuant to IND. APP. R. 15(G)).

However, Judge Chezem did not agree.⁹³ Although Judge Chezem agreed with the majority that as a general proposition an unemployed person cannot be fired, she observed "that is exactly what happened in this case; Lawson was still an employee of [defendant], but was eligible for unemployment benefits as a result of her employer's unwillingness to, at that time, allow her to return to work."⁹⁴ As such, the interference with the employee's attempt to recover statutory benefits is exactly that behavior proscribed by *Frampton*. Therefore, even though damages might be difficult to measure, Judge Chezem would have reversed the grant of summary judgment to the employer.⁹⁵

Hamann v. Gates Chevrolet, Inc.,⁹⁶ a diversity case, presented an even closer question of retaliatory discharge than did *Lawson* or *Smith*. Yet, once again, an appellate court upheld summary judgment for defendant. In *Hamann*, a car dealership company hired plaintiff in 1982 as a title clerk. She was reassigned to the accounting department, but occasionally processed titles as well. Part of her responsibilities involved several illegal activities: altering titles, forging signatures, and notarizing false documents. From 1983 until 1985, she refused on numerous occasions to alter car titles illegally. Although she complained frequently to her supervisors and refused to participate in the illegal activities, Gates did not fire her. In September 1985, a co-worker sought Hamann's advice concerning some illegal machinations of a title and Hamann advised the co-worker that it was wrong to do so. Hamann also telephoned an employee of a separate, but related, business entity and told her about Gates's illegal methods of title alteration. About a month later, Gates fired Hamann.⁹⁷

In response, Hamann sued Gates. Relying on *McClanahan v. Remington Freight Lines*,⁹⁸ she alleged that Gates fired her in retaliation for refusing to commit illegal acts for which she would be personally liable. The Seventh Circuit concluded that Hamann did not have a successful retaliatory discharge claim because *McClanahan* requires the plaintiff to prove more than that she was fired; she must allege and prove that her termination was caused by a prohibited retaliatory motive.⁹⁹ According to the Seventh Circuit, Hamann failed to do this. The court rejected Hamann's argument that it was reasonable to infer from the timing of her termination that it was done in retaliation for her refusal

93. *Id.* at 861 (Chezem, J., dissenting).

94. *Id.* at 862.

95. *Id.*

96. 910 F.2d 1417 (7th Cir. 1990).

97. *Id.* at 1419.

98. 517 N.E.2d 390 (Ind. 1988).

99. *Hamann*, 910 F.2d at 1420.

to alter documents illegally. Instead, Judge Eschbach, writing for the majority, stressed that the causation element, common in both title VII and Indiana retaliatory discharge claims,¹⁰⁰ was deficient. The fact that Hamann refused, with apparent impunity, to participate in the illegal scheme for some two years prior to termination destroyed the requisite nexus between her conduct and the alleged retaliatory discharge. Further, Gates's proffered reasons for firing Hamann ("bad attitude" and "lack of productivity") did not evidence retaliation, but were explainable from a "management perspective."¹⁰¹ Hamann was fired for "spread[ing] discomfort" among co-workers and "spread[ing] news that Gates was altering titles among persons outside of Gates."¹⁰² This, reasoned the court, may be a poor reason to fire an employee, but one that *McClanahan* does not proscribe.¹⁰³

McClanahan allows a claim of retaliatory discharge if there is a causal nexus between the employee's refusal to commit an illegal act for which he or she would be personally liable and termination.¹⁰⁴ Although *McClanahan* seemed to broaden the narrow exception to the general at-will rule based on exercise of statutory rights that *Frampton* articulated, it did not expressly reach all "whistleblowing" conduct.¹⁰⁵ Yet Hamann's claim is clearly encompassed by *McClanahan*. Given the conflicting inferences to be drawn from the timing of Gates's discharge of Hamann, there is, at least for purposes of disposition on summary judgment, a material fact in dispute. As Judge Wood noted in dissent, "the evidence as a whole" suggested it is not "unreasonable to view Hamann's discharge as sufficiently related to her refusal to advance the allegedly illegal activities of her employer,"¹⁰⁶ thereby rendering summary judgment inapposite. Interestingly, in a diversity case decided just a few years prior to *McClanahan*, the district court held that an employee discharged for refusing to participate in an illegal scheme to set back odometers stated a retaliatory discharge claim under Indiana law.¹⁰⁷ The Seventh Circuit did not refer to this case in *Hamann*.

During the survey period, at least one plaintiff succeeded in stating a retaliatory discharge claim. *Call v. Scott Brass, Inc.*¹⁰⁸ addressed the

100. *Id.*

101. *Id.* at 1422.

102. *Id.*

103. *Id.* Judge Wood dissented: "This situation is too much for summary judgment."
Id.

104. *McClanahan*, 517 N.E.2d 390.

105. *Id.*

106. *Hamann*, 910 F.2d at 1422 (Wood, J., dissenting).

107. *Sarratore v. Longview Van Corp.*, 666 F. Supp. 1257 (N.D. Ind. 1987).

108. 553 N.E.2d 1225 (Ind. Ct. App. 1990).

interplay between a *Frampton* cause of action and a statute that contains a civil remedy for the proscribed conduct.

Indiana law provides, in part, that it is a Class B misdemeanor to intentionally dismiss an employee because that employee has received or responded to a jury summons.¹⁰⁹ Further, an employee may, within ninety days of dismissal, sue for lost wages and reinstatement, and also may recover reasonable attorney's fees if successful.¹¹⁰ The *Call* plaintiff appeared for jury service on November 3, 1986. On that date, after threats of discharge if she complied with the jury summons, Brass discharged her. Call filed a complaint on March 9, 1987, to which Brass responded by a motion to dismiss, claiming that since its enactment in 1977, the Indiana Code provided the exclusive remedy for interference with jury service and that, therefore, Call's claim was time-barred under the Code. The trial court agreed and granted summary judgment for defendant on this basis.¹¹¹ The Indiana appellate court reversed.

The question before the court was whether the Indiana statute supplemented or excluded common law remedies. Under Indiana law, when the legislature enacts a statute that creates a new right and prescribes a remedy, the statutory remedy is exclusive.¹¹² Therefore, resolution of Call's claim depended upon timing: did the judicially created *Frampton/McClanahan* public policy exception precede the statutory remedy? The Indiana Supreme Court decided *Frampton* in 1973 and *McClanahan* in 1988. The legislature enacted the civil remedies for interference with jury service in 1977. If *Frampton* created the cause of action stated by Call, then the statutory remedies were not exclusive and Call's claim not time-barred. If, however, *Frampton* is viewed as limited to its facts until 1988, when the Indiana Supreme Court expanded the *Frampton* at-will exception in *McClanahan*, then the statute provides the exclusive remedy and Call's claim would fail.¹¹³

After an extensive examination of relevant case law since 1973, Judge Chezem, writing for the majority, concluded that *McClanahan* did not create a new cause of action as defendant urged, but "merely adopted and applied the Court of Appeals' interpretation of *Frampton*."¹¹⁴ Appellate decisions since *Frampton*, as well as the 1988 Indiana Supreme Court decision in *McClanahan*, "did not gradually develop the tort of retaliatory discharge; rather, the[se] courts . . . interpreted *Frampton*

109. IND. CODE ANN. § 35-44-3-10 (West 1986).

110. IND. CODE ANN. § 34-4-29-1 (West 1983).

111. *Call*, 553 N.E.2d at 1226.

112. *Id.* at 1227 (citations omitted).

113. *Id.*

114. *Id.* at 1229.

itself.”¹¹⁵ Therefore, the retaliatory discharge tort created by the judiciary preceded by four years the statutory remedy crafted by the legislature, which, then, is not exclusive.¹¹⁶

It should be noted, however, that the court might well reach the same conclusion even if the timing varied — that is, even if the statute predated the *Frampton* cause of action. Other statutes containing exclusive remedies expressly state their exclusivity, as in the Worker’s Compensation Act,¹¹⁷ Worker’s Occupational Diseases Act,¹¹⁸ and Medical Malpractice Act.¹¹⁹ The jury dismissal statute makes no mention of exclusivity. Therefore, the court would not be inclined to read it into the statute.¹²⁰

Despite the plaintiff’s success in *Call*, the conclusion to be drawn from the retaliatory discharge cases during the survey period is that Indiana is still very much an “at-will” state. Courts have been hesitant to extend *Frampton* and *McClanahan* much beyond their facts. At least in the employment area, Indiana courts seem unwilling to define public policy broadly, believing it to be a job best left to the legislature.¹²¹

VI. THE SCOPE OF THE MEDICAL MALPRACTICE ACT

Indiana’s Medical Malpractice Act¹²² represents the nation’s most strict and most lasting effort to curtail the cost of medical malpractice insurance. Its cap on the amounts awarded, raised from \$500,000 to \$750,000 this year,¹²³ and its precondition to suit, presentation to a

115. *Id.*

116. *Id.* Cf. *Holtz v. Board of Comm’rs of Elkhart County*, 548 N.E.2d 1220 (Ind. Ct. App. 1990) (county’s termination of plaintiff’s employment for “whistle blowing” is not within the purview of the Indiana Tort Claims Act, IND. CODE ANN. § 34-4-16-5-1 (West 1983), because a retaliatory discharge claim does not involve personal injury, death, or “property” loss).

117. IND. CODE ANN. § 22-3-2-6 (West Supp. 1990).

118. *Id.* § 22-3-7-6.

119. *Id.* § 16-9.5-9-2.

120. *Call*, 553 N.E.2d at 1229. The court also rejected defendant’s argument that its conduct did not fall within *Frampton/McClanahan* prohibitions because plaintiff here would not be without a remedy. *Id.* at 1229-30.

121. See, e.g., *id.* at 1229 (citations omitted).

122. IND. CODE ANN. § 16-9.5-9-2 (West Supp. 1990).

123. Pub. L. No. 189-1989, § 2(a) (codified at IND. CODE ANN. § 16-9.5-2-2 (West Supp. 1990) (for acts of malpractice occurring on or after Jan. 1 1990)). Only three other states, Nebraska, South Dakota, and Virginia, have absolute limits on all damages and these states cap the amount at \$1 million. See, e.g., S.D. CODIFIED LAWS ANN. § 21-3-11 (1988). See also Wilkerson, *Indiana Law at Center of Malpractice Debate*, N.Y. Times, Aug. 20, 1990, at A13, col. 1. Most states restrict only pain and suffering damages. See, e.g., CAL. CIV. CODE § 3333.2 (West Supp. 1989); OHIO REV. CODE ANN. § 2307.43 (Baldwin 1989).

medical review panel,¹²⁴ arguably have achieved the desired result. Indiana malpractice insurance premiums are among the lowest in the nation and the number of Indiana doctors has risen by fifty percent since 1975.¹²⁵ A recurrent problem, however, is defining the reach of the Act; for which of the injuries allegedly caused by health providers must a plaintiff comply with the Act? The question is, then, whether the tort claim arises as a consequence of the physician-patient relationship such that a plaintiff must submit all proposed malpractice claims to a medical review panel before filing suit against the health care provider. In several cases during the survey period, the Indiana appellate court addressed this question.

*Midtown Community Mental Health Center v. Estate of Gahl*¹²⁶ involved a wrongful death claim against a health care provider brought after a former patient of the mental health center shot and killed Gahl, a non-patient. The plaintiff alleged that defendant was negligent in the care of the patient and failed to warn Gahl of the patient's dangerous propensities. Defendant filed a motion to dismiss for failure to fulfill the pre-suit administrative medical review as required by the Indiana Medical Malpractice Act. The appellate court affirmed the denial of defendant's motion to dismiss. It concluded that the clear focus of the Act was the physician-patient relationship.¹²⁷ Because Gahl was not a patient, the defendant's conduct did not come within the purview of the Act. Rather, the Act's purpose was "unrelated to the sort of liability a health care provider risks when a patient commits a criminal act against a third party."¹²⁸ Even though the claim was based on conduct that could constitute malpractice relative to the third party, it did not constitute malpractice relative to Gahl.¹²⁹ Although "related" to the alleged malpractice, the claim was "not so intertwined" as to come within the Act's procedural requirements.¹³⁰

The court reached a similar conclusion in *Collins v. Thakkar*,¹³¹ *Harts v. Caylor-Nickel Hospital, Inc.*,¹³² and *Methodist Hospital of*

124. IND. CODE ANN. § 16-9.5-9-2 (West 1988).

125. Wilkerson, *supra* note 123.

126. 540 N.E.2d 1259 (Ind. Ct. App. 1989).

127. *Id.* at 1262 (citing IND. CODE ANN. § 16-9.5-1-1(h) (West Supp. 1990)). The Act defines malpractice as "any tort or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient." *Id.* (emphasis in original).

128. *Id.*

129. *Id.*

130. *Id.* It should be noted that Gahl's failure-to-warn claim may very well succeed. *Cf. Webb v. Jarvis*, 553 N.E.2d 151 (Ind. Ct. App. 1990) (shooting victim's negligence claim against assailant's physician states a claim because defendant owed a duty to this foreseeable plaintiff).

131. 552 N.E.2d 507 (Ind. Ct. App. 1990).

132. 553 N.E.2d 874 (Ind. Ct. App. 1990).

Indiana, Inc. v. Ray.¹³³ In all three cases, unlike *Gahl*, the plaintiff was a patient of the defendant health care provider. In *Harts* and *Ray*, plaintiffs suffered injury during hospitalization. Harts broke his hip as a result of a bedrail giving way and Ray contracted Legionnaire's disease. Defendants in both cases argued that the court had no subject matter jurisdiction because plaintiffs failed to comply with the medical review procedures of the Indiana Medical Malpractice Act. The courts disagreed, noting that not every patient-provider claim is subject to the Act's coverage. Rather, both Harts and Ray alleged ordinary negligence, unrelated to the rendering of medical treatment that would be subject to the Act's requirements. The issue in these cases, the courts stated, revolved around premises liability, deriving from common law.¹³⁴ The purpose of the medical review panel is to engage the expertise of those "actually qualified" in evaluating malpractice claims.¹³⁵ The services of these people are simply not needed in dealing with matters of ordinary negligence.¹³⁶

On very different facts, the *Collins v. Thakkar*¹³⁷ court reached the same conclusion. Sometime after Collins became Thakkar's patient, their relationship became sexually intimate. Collins subsequently consulted Thakkar about the possibility that she was pregnant with his child. Thakkar examined Collins, assured her that she was not pregnant, but then without her consent employed a metal instrument that caused her great pain and resulted in a miscarriage.¹³⁸ The court rejected defendant's contention that the Act governed Collins's claim.

Instead, the court read the Act as applying only to medical services "undertaken in the interest of or for the benefit of the patient's health," and involving "the exercise of professional judgment."¹³⁹ Here, in contrast, the physician's actions were "purposeful," "wanton and gratuitous," and "not designed to promote the patient's health."¹⁴⁰ Therefore, in the court's view, Collins's allegations were determinable by a jury, without need of such prior medical review as the Act requires.¹⁴¹

Taken together, these four cases seem to narrow the potentially broad applicability of Indiana's Medical Malpractice Act. Apparently, patient status is required before the Act's procedural review requirements

133. 551 N.E.2d 463 (Ind. Ct. App. 1990).

134. *Harts*, 553 N.E.2d at 878; *Ray*, 551 N.E.2d at 469.

135. *Ray*, 551 N.E.2d at 468.

136. *Harts*, 553 N.E.2d at 878-79; *Ray*, 551 N.E.2d at 468.

137. 552 N.E.2d 507 (Ind. Ct. App. 1990).

138. *Id.* at 509.

139. *Id.* at 510-11.

140. *Id.* at 511.

141. *Id.*

apply;¹⁴² however, *Collins*, *Harts*, and *Ray* indicate that patient status alone does not suffice. Instead, the courts will carefully inquire into the nature of the complained-of conduct, loathe to consign plaintiff's "ordinary" tort claims to the procedural restrictions of the Act. The effect, of course, is to free these plaintiffs from the necessity of referring their claims initially to a board of medical experts as a condition precedent to suit. An even more significant impact of these decisions is to provide successful plaintiffs with an uncapped damage remedy. The Act's cap of \$750,000 would also not apply in claims of ordinary negligence against health care providers.¹⁴³

VII. WRONGFUL LIFE

In *Cowe v. Forum Group, Inc.*,¹⁴⁴ the Indiana Court of Appeals upheld claims of wrongful life and prenatal tort based on preconception negligence. To sustain its conclusion, the court had to read quite narrowly the proscription of the Indiana statute that states that "no person shall maintain a cause of action or receive an award of damages on his behalf based on the claim that but for the negligent conduct of another he would have been aborted."¹⁴⁵

Only a few states have allowed a wrongful life action.¹⁴⁶ A wrongful life claim is brought on behalf of an impaired child and alleges that negligent advice, diagnoses, or treatment given to the child's parents allowed the child to be conceived and born. In contrast, wrongful birth claims are brought by parents. The crux of a wrongful birth claim is that negligent advice or treatment deprived the parents of the choice of terminating the pregnancy by abortion, thereby preventing birth of a defective child.¹⁴⁷

142. *Midtown Community Mental Health Center v. Estate of Gahl*, 540 N.E.2d 1259 (Ind. Ct. App. 1989).

143. *Cf. Collins*, 552 N.E.2d at 510 ("acts or omissions of a health care provider unrelated or outside the provider's role as a health care professional are not the Act's aim").

144. 541 N.E.2d 962 (Ind. Ct. App. 1989). For a good discussion of *Cowe*, see Note, *Pay Me Now or Pay me Later?: The Question of Prospective Damage Claims for Genetic Injury in Wrongful Life Cases*, 23 IND. L. REV. 753 (1990).

145. IND. CODE ANN. § 34-1-1-11 (West Supp. 1990).

146. See, e.g., *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983).

147. See, e.g., *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528 (1985); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975). Courts have also permitted parents to recover for "wrongful pregnancy." See, e.g., *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. 1974); *Garrison v. Foye*, 486 N.E.2d 5 (Ind. Ct. App. 1985). For a discussion of these and related claims, see generally

In *Cowe*, the Indiana Court of Appeals took the "road less traveled," and recognized a wrongful life claim.¹⁴⁸ The impact of its holding, however, may be lessened due to the special circumstances of *Cowe*. Cowe's mother is an extremely retarded adult, is unable to speak, and has no muscle control. While residing in a nursing home, she was raped by another resident and conceived a child, Jacob.¹⁴⁹ Jacob sued the owner of the nursing home for wrongful life, negligence, and prenatal tort.¹⁵⁰

According to the court, Jacob's wrongful life claim was not precluded by the Indiana statute which bars claims that "but for the negligent conduct of another [the child] would have been aborted."¹⁵¹ The court interpreted Jacob's claim as contending that "but for [defendant's] negligence he would not have been conceived," rather than as asserting "he would have or should have been aborted."¹⁵² Based on this constrained interpretation of the complaint and the "unusual situation" presented by the severe mental or physical impairments of both parents, the court permitted Jacob's wrongful life action, for which he could recover damages from the date of his birth until his adoption.¹⁵³

Due to the special circumstances of *Cowe* and the procedural posture of the case (appeal of summary judgment for defendant), it is difficult to assess whether *Cowe*'s wrongful life decision will be applied broadly. Given the strong dissent of Judge Ratliff,¹⁵⁴ the somewhat cursory treat-

Bopp, Bostrom & McKinney, *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 DUQ. L. REV. 461 (1969); *Special Project: Legal Rights and Issues Surrounding Conception, Pregnancy and Birth*, 39 VAND. L. REV. 597 (1986).

148. *Cowe*, 541 N.E.2d at 965.

149. *Id.* at 964.

150. *Id.* at 965.

151. IND. CODE ANN. § 34-1-1-11 (West Supp. 1990).

152. *Cowe*, 541 N.E.2d at 965.

153. *Id.* at 966. *But see id.* at 970-974 (Ratliff, J. dissenting). The court also allowed recovery for failing to provide prenatal care that might result in fetal hydantoin syndrome. *Id.* at 967-68.

154. Judge Ratliff would deny the wrongful life claim on two bases. First, he notes that the majority's effort to distinguish the language of IND. CODE § 34-1-1-11 from Jacob's complaint fails. One count of the complaint states that Jacob "is owed a duty of support by [Forum] because negligence proximately caused his birth into a world in which there was no natural parent capable of caring for and supporting him." *Cowe*, 541 N.E.2d at 971 (Ratliff, J. dissenting). This seems to conflict with the policy expressed in § 34-1-1-11 that life, even if impaired or burdened, is preferable to non-life. Secondly, Judge Ratliff emphasized the impossibility of measuring appropriate damages: "the relative benefits of an impaired life as opposed to no life at all. . . ." (quoting *Simienic v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 512 N.E.2d 691 (1987) (rejecting wrongful life claim)). Further, Judge Ratliff noted that, unlike those few prior cases in which a specific birth defect was involved, Jacob could show no medical evidence indicating that he actually suffers a disability or defect. *Id.* at 973.

ment of the wrongful life issues, and the arguably limited window of damages (birth to adoption),¹⁵⁵ *Cowe* may not prove to be the landmark decision it otherwise might be.

VIII. HEDONIC DAMAGES

[T]o enjoy the companionship of loved ones, . . . to see the glorious dawn and sunset, to feel the caress of gentle breezes or the invigorating sting of winter winds, to hear the murmur of the idling brook and the music of warbling birds, to smell the sweet fragrance of nature's flowers, and to taste the diet of life itself.¹⁵⁶

This is the enjoyment, the pleasure of living, the "hedonic"¹⁵⁷ value of life. In three cases decided on the same day,¹⁵⁸ the Indiana Court of Appeals for the Third District decided that loss of enjoyment of life is not recoverable as a separate element of damages, but may be a factor in determining damages for physical injury.¹⁵⁹ Further, the court held that any claims based on reduction of the enjoyment of life must be coupled, in jury instructions, for damages either with pain and suffering claims or permanency of injury allegations.¹⁶⁰ The Indiana Supreme Court, in vacating the court of appeals decision in *Canfield*, agreed that a plaintiff is not entitled to a jury instruction treating loss of enjoyment of life as a separate element of damages.¹⁶¹ Rather, that aspect of damages is to be included in the assessment of the permanency of the damages.¹⁶²

There is a slowly growing body of case law that recognizes hedonic (loss of enjoyment of life) damages as a separate element in wrongful

155. Judge Conover, concurring, would broaden the damages available to Jacob to include "mental pain, suffering and anguish based on any diminished quality of life he may suffer from being the genetic off-spring of mentally deficient parents." *Cowe*, 541 N.E.2d at 968.

156. *Downie v. United States Lines, Inc.*, 359 F.2d 344, 350 (3d Cir. 1966) (Kalodner, C.J. dissenting).

157. From the Greek *hedonikos* — pleasure of living.

158. The claims in each case arose from automobile accidents.

159. *Canfield v. Sandock*, 546 N.E.2d 1237 (Ind. Ct. App. 1989), *vacated*, 563 N.E.2d 1279 (Ind. 1990); *Marks v. Gaskill*, 546 N.E.2d 1245 (Ind. Ct. App. 1989); *Seifert v. Bland*, 546 N.E.2d 1242 (Ind. Ct. App. 1989).

160. *Canfield*, 546 N.E.2d at 1242; *Marks*, 546 N.E.2d at 1249; *Seifert*, 546 N.E.2d at 1244.

161. *Canfield v. Sandock*, 563 N.E.2d 1279, 1282 (Ind. 1990).

162. *Id.*

death actions based on 42 U.S.C. § 1983.¹⁶³ Additionally, a few courts have treated loss of enjoyment of life as a separate element of damages for injury¹⁶⁴ or death.¹⁶⁵ Nonetheless, Indiana's rejection of this view clearly is in the mainstream. Courts in nearly every state have declined to permit separate recovery of hedonic damages.¹⁶⁶

The primary reason courts, including the Indiana Court of Appeals and the Indiana Supreme Court, refuse to permit recovery for hedonic damages is the danger of double recovery if loss of enjoyment is treated as a separate element of damages.¹⁶⁷ Arguably, a plaintiff can recover for his or her injuries all damages proximately caused by the defendant, including pain and suffering and reduction of the ability to live life normally. If hedonic damages were recoverable, the same "damages" that are a factor (such as in pain and suffering) also would be recoverable, thereby permitting duplicate awards for what is essentially the same injury.¹⁶⁸

Not mentioned by the Indiana Court of Appeals as a basis for its decision, but often advanced as another reason to deny separate hedonic damages, is the difficulty of assessing the monetary value of the pleasure of life. The valuation of hedonic loss is potentially fraught with great uncertainty and jury whim. One economist has noted that the hedonic value of life could range from under \$100,000 to more than \$2 billion.¹⁶⁹ Given the current "tort reform" caps on pain and suffering,¹⁷⁰ attempted restrictions of punitive damages¹⁷¹ and medical malpractice awards,¹⁷²

163. *Guyton v. Phillips*, 532 F. Supp. 1154 (N.D. Cal. 1981), was the first case to allow a decedent's estate to recover for loss of life's pleasures. *See also* *Sherrod v. Berry*, 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *rev'd on other grounds on reh'g*, 856 F.2d 802 (7th Cir. 1988). *See generally* Blodgett, *Hedonic Damages*, 71 A.B.A. J. 25 (Feb. 1985); Note, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 PAC. L.J. 965 (1981); Blum, *More Suing Over Lost Joy of Life: Defense - Plaintiffs' Bars Split on Hedonic Damages*, Nat'l L.J., Apr. 17, 1989, at 1, col. 3.

164. *See, e.g.,* *Culley v. Pennsylvania R.R.*, 244 F. Supp. 710 (D. Del. 1965) (applying Maryland law); *Powell v. Hegney*, 239 So. 2d 599 (Fla. App. 1970).

165. *See e.g.,* *Katsetos v. Nolan*, 170 Conn. 637, 368 A.2d 172 (1976).

166. *See* Note, *Hedonic Damages in Section 1983 Actions: A Remedy for the Unconstitutional Deprivation of Life*, 44 WASH. & LEE L. REV. 321, 328 (1987).

167. *See Canfield*, 546 N.E.2d at 1237; *Marks*, 546 N.E.2d at 1245; *Seifert*, 546 N.E.2d at 1242.

168. *See, e.g., Seifert*, 546 N.E.2d at 1244.

169. Smith, *Hedonic Damages in Wrongful Death Cases*, 74 A.B.A. J. 70 (Sept. 1, 1988) (Smith testified for plaintiff in *Sherrod v. Berry*, 629 F. Supp. 159 (N.D. Ill. 1985) and argued in favor of hedonic damage awards.).

170. *See generally* Martin, *Limiting Damages for Pain and Suffering: Arguments Pro and Con*, 10 AM. J. TRIAL ADVOC. 317 (1986).

171. *See, e.g.,* *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989) (punitive damages in a civil case far exceeding actual damages do not violate the

and the problematic nature of hedonic damages, the Indiana courts' rejection of "enjoyment of life" as a separate element of damages will likely remain the prevalent view.

IX. INDIANA CIVIL RICO

Inclusion of a review of developments (or remarkable lack thereof) in Indiana civil RICO litigation is appropriate in the context of tort discourse. This is so because the subject matter of both federal¹⁷³ and state¹⁷⁴ RICO proscriptions often involves conduct that comes within the ambit of what is described as "commercial" or "business" torts.¹⁷⁵

eighth amendment prohibition of "excessive fines"). This term the Court considered and rejected a fourteenth amendment due process challenge to allegedly excessive punitive damages. *Pacific Mut. Life Ins. Co. v. Haslip*, 59 U.S.L.W. 4157 (1991).

Some states have abolished punitive damages entirely. *See, e.g.*, N.H. REV. STAT. ANN. § 507:16 (1986). Other states have enacted caps on punitive damages awards. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-240b (West 1989) (two times compensatory damages).

172. *See, e.g.*, IND. CODE ANN. § 16-9.5-2-2(a) (West Supp. 1990).

173. 18 U.S.C. §§ 1961-1968 (1982 & Supp. 1989).

174. As of 1989, 28 states, including Indiana, have enacted versions of federal RICO. *See* ARIZ. REV. STATE ANN. §§ 13-2301 to -2316 (1978 & Supp. 1988); CAL. PENAL CODE §§ 186-186.8 (West 1988); COLO. REV. STAT. §§ 18-17-101 to -109 (1986 & Supp. 1988); CONN. GEN. STAT. ANN. §§ 53-393 to -403 (West 1985 & Supp. 1989); DEL. CODE ANN. tit. 11, §§ 1501-11 (1987); FLA. STAT. ANN. §§ 895.01 to .09 (West Supp. 1989); GA. CODE ANN. §§ 26-3401 to -3414 (Harrison 1988 & Supp. 1988); HAW. REV. STAT. §§ 842-1 to -12 (1985 & Supp. 1988); IDAHO CODE §§ 18-7801 to -7805 (1987 & Supp. 1989); ILL. ANN. STAT. ch. 56-1/2, paras. 1651-60 (Smith-Hurd 1985) (limited to narcotics); IND. CODE ANN. §§ 34-4-30.5-1 to -6 (West 1983 & Supp. 1990); *id.* §§ 35-45-6-1 to -2 (West Supp. 1990); LA. REV. STAT. ANN. §§ 15:1351-56 (West Supp. 1989) (limited to narcotics); MISS. CODE ANN. §§ 97-43-1 to -11 (Supp. 1988); NEV. REV. STAT. ANN. §§ 207.350-.520 (Michie 1986); N.J. STAT. ANN. §§ 2C:41-1 to -6.2 (West 1982 & Supp. 1989); N.M. STAT. ANN. §§ 30-42-1 to -6 (1978 & Supp. 1988); N.Y. PENAL LAW §§ 460.00 to .80 (McKinney Supp. 1988); N.C. GEN. STAT. §§ 75D-1 to -14 (1987 & Supp. 1988); N.D. CENT. CODE §§ 12.1-06 to -08 (1985 & Supp. 1989); OHIO REV. CODE ANN. §§ 2923.31 to .36 (Anderson 1987 & Supp. 1988); OKLA. STAT. ANN. tit. 22, §§ 1401-1419 (West Supp. 1989); OR. REV. STAT. §§ 166.715-735 (1985 & Supp. 1988); 18 PA. CONS. STAT. ANN. § 911 (Purdon 1983 & Supp. 1989); R.I. GEN. LAWS §§ 7-15-1 to -11 (1985); TENN. CODE ANN. §§ 39-1-1001 to -1010 (Supp. 1988); UTAH CODE ANN. §§ 76-10-1601 to -1609 (Supp. 1989); WASH. REV. CODE ANN. §§ 9A.82.001 to .904 (1988 & Supp. 1989); WIS. STAT. ANN §§ 946.80 to .87 (West Supp. 1987). Puerto Rico has also adopted a RICO statute. P.R. LAWS ANN. tit. 25, §§ 971-971(p) (1979 & Supp. 1988).

175. Legal literature has taken cognizance of this development. *See, e.g.*, *RICO: The Ultimate Weapon in Business and Commercial Litigation*, ABA SECTION ON LITIG. NAT'L INSTIT. (Nov. 1983). *See also* 3 BUSINESS TORTS 24.01 to .52 (Mathew Bender); G. ALEXANDER, *COMMERCIAL TORTS* 9, at 251 (2d ed. 1988). *See generally* RICO Business Disputes Guide (CCH); Civil RICO Report (BNA).

In 1970, Congress enacted RICO¹⁷⁶ as part of the Organized Crime Control Act.¹⁷⁷ RICO's target is "racketeering activity."¹⁷⁸ Racketeering activity entails five categories of prohibited conduct: (1) any act chargeable under any state's criminal law and punishable by imprisonment for more than one year;¹⁷⁹ (2) any act indictable under many specific federal statutes,¹⁸⁰ including mail¹⁸¹ and wire fraud;¹⁸² (3) any act indictable under 29 U.S.C. sections 186 (restrictions on payments and loans to labor organizations) or 501(c) (embezzlement from union funds);¹⁸³ (4) any offense involving securities fraud or drug-related activity punishable under federal law;¹⁸⁴ and (5) any act indictable under the Currency and Foreign Transactions Reporting Act.¹⁸⁵ Section 1962(a) of RICO prohibits using income derived from a pattern of racketeering activity (at least two acts within ten years¹⁸⁶) in an operation affecting interstate or foreign commerce.¹⁸⁷ Section 1962(b) prohibits control of an enterprise through a pattern of racketeering activity, while section 1962(c) proscribes use of an enterprise for racketeering activity.¹⁸⁸ Section 1962 also makes unlawful conspiracy to violate any of the first three provisions of section 1962.¹⁸⁹

Congress put sharp teeth into RICO's prohibitions. It provided criminal penalties of imprisonment, fines, and forfeiture for RICO violations.¹⁹⁰ Additionally, for private civil suits, RICO affords far-reaching remedies including treble damages, costs, and reasonable attorney's fees.¹⁹¹

176. Organized Crime Control Act, Pub. L. No. 91-452, tit. IX, 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961-1968 (1970)). One federal judge suspects that the statute's awkward title and convenient acronym reflect a movie buff's legislative sense of humor and Hollywood expertise. In "Little Caesar," the first Hollywood gangster movie of the early 1930s, Edward G. Robinson played the barely-disguised Al Capone role. The character's name was "Rico." See *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20 n.1 (N.D. Ill. 1982).

177. Pub. L. No. 91-452, 84 Stat. 922.

178. 18 U.S.C. § 1961(1) (1970).

179. *Id.* at (A).

180. *Id.* at (B).

181. *Id.* § 1341.

182. *Id.* § 1343.

183. *Id.* § 1961(1)(C).

184. *Id.* at (D).

185. *Id.* at (E). All told, "racketeering activity" means any act or threat involving one of thirty-two predicate offenses.

186. *Id.* § 1961(5).

187. *Id.* § 1962(a).

188. *Id.* at (e).

189. *Id.* at (d).

190. *Id.* § 1963.

191. *Id.* § 1964(c). The award of treble damages is mandatory, not discretionary. The statute provides that an injured plaintiff "shall recover threefold the damage . . .

To obtain damages under federal civil RICO, a plaintiff must allege and prove by a preponderance of the evidence¹⁹² that:

- (1) the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invest(ed) in, or maintain(ed) an interest in, or participat[ed] in (6) an "enterprise" (7) the activities of which affect(ed) interstate or foreign commerce.¹⁹³

Civil RICO plaintiffs must also allege and prove that they suffered injury in their business or property "by reason of a violation of section 1962."¹⁹⁴

Federal civil RICO cases have increased eight-fold since 1984 to nearly 1,000 cases during 1988,¹⁹⁵ many of them involving a business or commercial "tort." Diverse claims have furnished the bases for federal civil RICO suits, such as competitive hiring practices;¹⁹⁶ sexual harassment;¹⁹⁷ accountant,¹⁹⁸ attorney¹⁹⁹ and bank misconduct;²⁰⁰ misrepresentation;²⁰¹ wrongful discharge;²⁰² misappropriation of trade secrets;²⁰³ injury

sustain(ed)." *Id.* (emphasis added). In addition, some courts have permitted injunctive relief in private suits. *See, e.g., F.D.I.C. v. Antonio*, 843 F.2d 1311, 1313 (10th Cir. 1988) (private injunctive relief available under Colorado's state RICO statute); *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984) (federal RICO affords private equitable relief). *But see In re Fredeman Litig.*, 843 F.2d 821 (5th Cir. 1988) (private equitable relief is not available under federal civil RICO). *Cf. Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1047 (1980) (private equitable relief should be available).

192. *Parnes v. Heinold Commodities*, 487 F. Supp. 645, 647 (N.D. Ill. 1980). One commentator has observed that "a more exacting standard, such as 'clear and convincing evidence', may be more appropriate. . . ." Matz, *Determining the Standard of Proof in Lawsuits Brought Under RICO*, Nat'l L.J., Oct. 10, 1983, at 21. In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985), the United States Supreme Court expressly chose not to decide the standard of proof issue. *See also Rubin & Zwirb, The Economics of Civil RICO*, 20 U.C. DAVIS L. REV. 883, 884 (1987).

193. *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984).

194. *Id.* *See* 18 U.S.C. § 1964(c) (1982).

195. Rehnquist, *Diversity Jurisdiction and Civil RICO*, 21 ST. MARY'S L.J. 5, 9 (1989).

196. *Systems Research, Inc. v. Random, Inc.*, 614 F. Supp. 494 (N.D. Ill. 1985).

197. *Hunt v. Weatherbee*, 626 F. Supp. 1097 (D. Mass. 1986).

198. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982).

199. *Beth Israel Medical Center v. Smith*, 576 F. Supp. 1061 (S.D.N.Y. 1983).

200. *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

201. *California Architectural Bldg. Prods. v. Franciscan Ceramics*, 818 F.2d 1466 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988).

202. *Callan v. State Chemical Mfg.*, 584 F. Supp. 619 (E.D. Pa. 1984).

203. *Rockwell Graphic Sys. v. DEV Indus.*, RICO Business Disputes Guide (CCH) 6581 (N.D. Ill. 1987) (1987 WESTLAW 6862).

to goodwill and business reputation;²⁰⁴ and anti-abortion activism.²⁰⁵

The federal RICO "explosion"²⁰⁶ continues practically unabated — despite the professed distaste of federal judges,²⁰⁷ as expressed by Rule 11²⁰⁸ sanctions²⁰⁹ and strict imposition of Rule 9(b)²¹⁰ pleading requirements to civil RICO allegations of fraud.²¹¹ Not surprisingly, RICO issues have reached the Supreme Court. It has addressed the parameters of civil RICO in five cases.²¹² Yet the net effect of these decisions is that federal civil RICO remains a live, well, and available cause of action for a wide variety of civil complaints. Most RICO observers agree that the impact of one of the more recent Supreme Court RICO cases, *H. J., Inc. v. Northwestern Bell Telephone Co.*,²¹³ will be an increase in

204. *Ford Motor Co. v. B & H Supply*, 646 F. Supp. 975 (D. Minn. 1986).

205. *Northeast Women's Center v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 261 (1989); *Feminist Women's Health Center v. Roberts*, No. C86-1612 (W.D. Wash. 1989) (1989 WESTLAW 56017); *Roe v. Operation Rescue*, 710 F. Supp. 577 (E.D. Pa. 1989). *See generally* Yonover, *Fighting Fire with Fire: Civil RICO and Anti-Abortion Activists*, 12 WOMEN'S RIGHTS L. REP. 153 (1990).

206. Yonover, *supra* note 205, at 157 nn.43-44.

207. *See, e.g.*, *Fields v. National Republic Bank of Chicago*, 546 F. Supp. 123, 124 (N.D. Ill. 1982) ("[L]ike the myth of the lemming drawn to the sea, [plaintiff] follows the unfortunately all-too-prevalent trend of seeking to reshape the [state law] claim into one that can be wrapped into the RICO mantle."). *See also* Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985); P. BATISTA, *CIVIL RICO PRACTICE MANUAL* 4 (1987) (discussing federal judges' distaste for civil RICO); Fielkow and Eisenberg, *Civil RICO: The Insurers Fight Back*, 21 TORT & INS. L.J. 1, 3 & nn. 18-21 (1985).

208. FED. R. CIV. P. 11.

209. *See, e.g.*, *O'Malley v. New York City Transit Auth.*, 896 F.2d 704 (2d Cir. 1990); *Chapman & Cole v. Itel Container Int'l B.V.*, 865 F.2d 676 (5th Cir. 1989); *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249 (7th Cir. 1989).

210. FED. R. CIV. P. 9(b).

211. *See, e.g.*, *Cayman Exploration Corp. v. United Gas Pipeline Co.*, 873 F.2d 1357 (10th Cir. 1989); *Blount Fin. Serv., Inc. v. Walter Heller & Co.*, 819 F.2d 151 (6th Cir. 1987); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986).

212. The cases are: *Tafflin v. Levitt*, 110 S. Ct. 792 (1990) (civil RICO jurisdiction is concurrent, rather than exclusive); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893, 2905, 2906 (1989) (rejecting a "pinched" construction; RICO's pattern requirement involves "long term criminal conduct" or the threat of same); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (civil RICO actions are "arbitrable" under the Federal Arbitration Act, 9 U.S.C. § 1 (1988)); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987) (a four-year limitations period applies to all civil RICO actions); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) (civil RICO requires neither a prior criminal conviction of the predicate acts nor a special "racketeering"-type injury, but focuses upon proscribed activity indicative of "continuity plus relationship").

213. 109 S. Ct. 2893 (1989).

RICO claims and concomitant pressure on Congress to amend the statute.²¹⁴

Indiana is one of several states that has enacted RICO legislation²¹⁵ modeled on the federal statute and that, like federal RICO,²¹⁶ permit a civil action to be brought by a private party.²¹⁷ Under Indiana civil RICO, one has standing to sue as an "aggrieved person"²¹⁸ if it can be alleged that plaintiff has an interest in real property or in an enterprise that either is the object of corrupt business influence or has suffered damages or harm as a result of corrupt business influence.²¹⁹ If plaintiff can prove by a preponderance of the evidence²²⁰ that defendant engaged in a "pattern of racketeering activity"²²¹ (at least two predicate acts occurring within a five-year period²²²), then plaintiff can recover, as in federal RICO,²²³ treble damages, costs, and reasonable attorney's fees.²²⁴

214. See 5 Civ. RICO Rep. (BNA) 3 (July 4, 1989). Congress has in the past year considered several RICO reform bills. To date, none has passed. See Outlook for 1990: *Future of Reform is Cloudy; House, Senate Divided on Bill*, 5 Civ. RICO Rep. (BNA) 2 (Jan. 30, 1990). See also 5 Civ. RICO Rep. (BNA) 1 (June 26, 1990); 5 Civ. RICO Rep. 1 (BNA) (July 3, 1990).

215. See *supra* note 174.

216. 18 U.S.C. § 1964 (1982).

217. IND. CODE ANN. § 34-4-30.5-5 (Burns 1985 & Supp. 1989). Other states allowing private-party civil suits include Arizona (ARIZ. REV. STAT. ANN. § 13-2314A (1978 & Supp. 1989)); Colorado (COLO. REV. STAT. § 18-17-106(6) (1986 & Supp. 1989)); Delaware (DEL. CODE ANN. tit. 11, § 1505(c) (1989)); Florida (FLA. STAT. ANN. § 895.05(6) (West Supp. 1989)); Georgia (GA. CODE ANN. 26-3406 (Harrison 1988 & Supp. 1989)); Hawaii (HAW. REV. STAT. § 842-8(c) (1985 & Supp. 1989)); Idaho (IDAHO CODE § 18-7805(a) (1987)); Louisiana (LA. REV. STAT. ANN. § 15:1356(E) (West & Supp. 1989)); Mississippi (MISS. CODE ANN. § 97-43-9(5) (Supp. 1989)); Nevada (NEV. REV. STAT. ANN. § 207.470(1)(Michie 1986)); New Jersey (N.J. STAT. ANN. § 2C:41-4(c) (West 1982 & Supp. 1989)); New Mexico (N.M. STAT. ANN. § 30-42-6(A) (1978 & Supp. 1989)); Ohio (OHIO REV. CODE ANN. § 2923.34(B) (Anderson 1987 & Supp. 1989)); Oregon (OR. REV. STAT. § 166.725(6) (1985 & Supp. 1989)); Rhode Island (R.I. GEN. LAWS § 7-15-4(c) (1985)); Utah (UTAH CODE ANN. § 76-10-1605(1) (Supp. 1989)); Washington (WASH. REV. CODE ANN. § 9A.82.100(1)(a) (1988 & Supp. 1989)); Wisconsin (WIS. STAT. ANN. § 946.86(4) (West Supp. 1989)). See generally Annotation, *Civil Action for Damages Under State Racketeer Influenced and Corrupt Organizations Acts (RICO) for Losses from Racketeering Activity*, 62 A.L.R.4TH 654 (1988).

218. IND. CODE ANN. §§ 34-4-30.5-1 (West Supp. 1989). See generally Scanlon, *Elements of a RICO Violation* § II-37-8 (ICLEF RICO Litig. 1989).

219. IND. CODE ANN. § 34-4-30.5-1 (West Supp. 1990).

220. *Id.* § 34-4-30.5-5.

221. *Id.* § 35-45-6-1.

222. *Id.* The predicate acts include: securities violations, IND. CODE ANN. § 23-2-1 (West Supp. 1990); statutory fraud, IND. CODE ANN. § 35-43-5-4 (West Supp. 1990); and various crimes involving obscenity, violence, guns, or narcotics, IND. CODE ANN. § 35-45-6-1 (West Supp. 1990).

223. 18 U.S.C. § 1964 (1982).

224. IND. CODE ANN. 34-4-30.5-5(b)(1)-(3) (West Supp. 1990). An "aggrieved person" also has a claim, superior to the state, to forfeited property or proceeds therefrom. *Id.* § 34-4-30.5-5(d).

In addition, and unlike federal RICO, an Indiana RICO claimant may also seek punitive damages "allowable under law"²²⁵ and injunctive relief.²²⁶

Despite the broad thrust of Indiana RICO's proscriptions and the wide range of civil remedies afforded by the statute, only one reported case is founded, at least in part, upon a state civil RICO claim: *Blakley Corp. v. Klain*,²²⁷ decided in late spring, 1989. In *Blakley*, plaintiff-subcontractor sued the owner of a corporation that built residential housing. The subcontractor supplied labor and materials for several houses for which the corporation did not pay. Subsequently at the closings, the corporation, which had built the houses under contract with lot owners, executed vendor's affidavits representing that "[t]here are no unpaid claims for labor done upon or materials furnished for the Real Estate in respect of which liens have been or may be filed."²²⁸ The subcontractor claimed that these repeated acts of perjury in the vendor's closing affidavits constituted a pattern of activity proscribed by Indiana RICO,²²⁹ and sought civil remedies as an "aggrieved person."²³⁰ Blakely asserted that the vendor's affidavits extinguished its rights to liens on the properties.

The Indiana Court of Appeals reversed, in part, the grant of summary judgment to defendant. The court noted that concerning two houses, a genuine dispute existed about defendant's knowledge of the alleged falsehood in the vendor's affidavits.²³¹ Thus, on remand, plaintiff still had

225. *Id.* § 34-4-30.5-5(b)(4).

226. *Id.* § 34-4-30.5-5(a). To date, federal courts are split with respect to the availability of private injunctive relief in federal civil RICO actions. *Compare In re Fredeman Litig.*, 843 F.2d 821 (5th Cir. 1988); *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987) (private equitable relief is not available) with *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 97-98 (6th Cir. 1982) (RICO affords private injunctive relief). The Supreme Court has not addressed the issue but has opined that private equitable relief may not be available. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 153 (1987); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985).

227. 538 N.E.2d 304 (Ind. Ct. App. 1989). One commentator suggests that the paucity of state RICO cases may be due to the relative ease of pleading federal RICO claims. He suggests that if Congress curtails the use of federal RICO in business cases, state RICO claims may experience an upswing. Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 Nw. U.L. REV. 1198, 1212 n.79 (1988). This year Congress has indeed indicated a willingness to narrow the reach of civil RICO. *See* 5 Civ. RICO Rep. (BNA) 2 (Jan. 30, 1990); 5 Civ. RICO Rep. (BNA) 1 (June 26, 1990); 5 Civ. RICO Rep. (BNA) 1 (July 3, 1990).

228. *Blakley*, 538 N.E.2d at 305.

229. *Id.* at n.2 (citing IND. CODE ANN. § 35-45-6-2(a)(1) (West 1986)).

230. *Id.* (citing IND. CODE ANN. § 34-4-30.5-5(b) (West Supp. 1990)).

231. *Id.* at 307.

a potentially viable RICO claim based on two predicate acts of racketeering activity.

Surprisingly, since the enactment of Indiana RICO in 1980 there has been only one reported private civil case. Allegations of business fraud, similar to the *Blakley* complaint, have often furnished the bases for federal RICO claims.²³² It is even more surprising when the panoply of state remedies is considered.²³³ Whether this lack is due to the availability of federal RICO²³⁴ (and the concomitant access to federal courts)²³⁵ or unfamiliarity with a relatively new statute is unclear. Several private suits in other jurisdictions have been based on state RICO statutes.²³⁶ Nevertheless, *Blakley* stands alone in Indiana. It indicates, however, that given the appropriate facts, a viable private civil RICO suit can be brought based on "racketeering activity," which in *Blakley* allegedly amounted to tortious business fraud.

232. See, e.g., *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249 (7th Cir. 1989) (affirming Judge Moody's grant of summary judgment for defendant-developers on RICO claim). See also *supra* notes 225-28.

233. See *supra* notes 225-26.

234. See *supra* notes 195-205.

235. Note, however, that state courts have concurrent jurisdiction over federal RICO claims. See *Tafflin v. Levitt*, 110 S. Ct. 792 (1990).

236. See, e.g., *Sattell v. Continental Casualty Co.*, (Wis. App. 1990) (1990 WES-TLAW 130820); *Banco Indus. de Venezuela, C.A. v. Suarez*, 541 So. 2d 1324 (Fla. App. 1989); *Computer Concepts, Inc. Profit Sharing Plan v. Brandt*, 98 Or. App. 618, 780 P.2d 249 (1989); *Hale v. Burkhardt*, 764 P.2d 866 (Nev. 1988); *James v. Wolfe*, 512 So. 2d 954 (Fla. App. 1987); *Daggett v. Jackie Fine Arts, Inc.*, 152 Ariz. 559, 733 P.2d 1142 (1986); *Waldschmidt v. Crosa*, 177 Ga. App. 707, 340 S.E.2d 664 (1986); *Banderas v. Banco Cent. del Ecuador*, 463 So. 2d 523 (Fla. App. 1985).

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Indiana's Medical Malpractice Act: Results of a Three-Year Study©

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I. INTRODUCTION

In 1987, The Center for Law and Health at Indiana University School of Law—Indianapolis began a three-year study of Indiana's Medical

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Malpractice Act (the "Act").¹ This Article discusses the basic findings of the study.² Specifically, this Article reports the following: (1) Major provisions of the Act, including the leading court decisions interpreting these provisions; (2) empirical data on malpractice claims, claimants, and defendants obtained from the claim files of the Indiana Department of Insurance from 1975 through 1988; (3) findings regarding the performance of Indiana's reforms; and (4) problems with the Act, along with possible approaches for improvements.

II. THE INDIANA MEDICAL MALPRACTICE ACT

A. Background

In the 1970s, Indiana, like many other states, experienced a perceived crisis in the cost and availability of medical malpractice insurance for health care providers.³ Specifically, the size and frequency of medical malpractice claims increased sharply. Frequency of claims filed against physicians between 1970 and 1975 increased 42%, and the average damage award increased from \$12,993 in 1970 to \$34,297 in 1975. Accordingly, malpractice insurance premiums rose 410% for physicians between 1970 and 1975.⁴

The availability of malpractice insurance for providers decreased sharply in the mid-1970s. In the summer of 1974, St. Paul Fire and Marine Insurance Company advised nearly 1,000 Indiana physicians that it would not renew their malpractice insurance. Seven major malpractice insurers discontinued or limited the writing of liability insurance for hospitals. Some Indiana hospitals reported curtailing emergency and surgery services because of the high cost of liability insurance or lack of insured physicians to staff these services.⁵

1. IND. CODE §§ 16-9.5-1-1 to -10-5 (1988).

2. This Article is an expanded version of the article by Kinney & Gronfein, *Indiana's Malpractice System: No-Fault by Accident?*, LAW & CONTEMP. PROBS. (forthcoming 1991). This Article is directed to constituencies who are particularly concerned with medical malpractice in Indiana. Therefore, this Article contains additional data and analysis that the authors deemed of particular interest to Indiana health care providers, consumers, and policy-makers.

3. See generally Bowen, *Medical Malpractice Law in Indiana*, 11 J. LEGIS. 15 (1984); Benjamin, *Indiana's Medical Malpractice Crisis*, in A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE 38 (1976); IND. MED. MALPRACTICE STUDY COMM'N, FINAL REPORT OF THE MEDICAL MALPRACTICE STUDY COMM'N 5-6 (1976) [hereinafter FINAL REPORT OF THE MEDICAL MALPRACTICE STUDY COMM'N].

4. FINAL REPORT OF THE MEDICAL MALPRACTICE STUDY COMM'N, *supra* note 3, at 5, 33.

5. See *Mansur v. Carpenter*, No. 37281, Findings of Fact, Conclusions of Law, and Judgment Entry, at 3-4 (Hancock Cir. Ct. Apr. 6, 1978).

In January 1975, Governor Otis R. Bowen called for malpractice reform in his State of the State message.⁶ On February 4, 1975, House Bill 1460, drafted by attorneys for the Indiana State Medical Association,⁷ was introduced into the Indiana House of Representatives.⁸ The bill called for an independent administrative tribunal comprised of physicians, lawyers, and consumers to adjudicate malpractice claims and to award damages and attorney's fees according to set formulas.⁹ Most Indiana senators opposed the bill as too great a departure from the common law jury system, and the Indiana Senate substantially amended the Act substituting the elements of the current Act. On April 17, 1975, the Indiana General Assembly finally enacted the Act.¹⁰

The Act's purpose was to provide health care providers with affordable medical malpractice insurance and thus assure the continued availability of health care services in the state.¹¹ Shortly after enactment, medical malpractice premiums in Indiana dropped and insurance became readily obtainable again. Since the mid-1970s, malpractice insurance premiums have been relatively low compared to other states.¹² More importantly, the affordability and availability of malpractice insurance remained stable in Indiana during the mid-1980s when other states experienced serious problems in this area.¹³ Not surprisingly, health care providers and insurers are highly satisfied with the system.¹⁴ However, a series of articles in the *Indianapolis Star* in June 1990 raised questions about whether the Act promotes the interests of providers and insurers over those of claimants.¹⁵

6. Message of Governor Otis R. Bowen to the General Assembly, State of Indiana, JOURNAL OF THE HOUSE 31-36 (Jan. 9, 1975); see also Benjamin, *supra* note 3, at 38; Bowen, *supra* note 3, at 15.

7. See Benjamin, *supra* note 3, at 39.

8. H.R. 1460, 99th Gen. Ass., 1st Sess., 1975 Ind. Acts 146.

9. See Benjamin, *supra* note 3, at 39-40.

10. Act of Apr. 17, 1975, Pub. L. No. 146-1975, 1975 Ind. Acts 854 (codified as amended at IND. CODE §§ 16-9.5-1-1 to -10-5 (1988)).

11. H.R. 1460, § 1(a)-(j), 99th Gen. Ass., 1st Sess. (1975). See Bowen, *supra* note 3; Benjamin, *supra* note 3; Johnson v. St. Vincent's Hosp., 273 Ind. 374, 404 N.E.2d 585 (1980); Mansur v. Carpenter, No. 37281, Findings of Fact, Conclusions of Law, and Judgment Entry (Hancock Cir. Ct. Apr. 6, 1978).

12. GEN. ACCOUNTING OFF., MEDICAL MALPRACTICE INSURANCE COSTS INCREASED BUT VARIED AMONG PHYSICIANS AND HOSPITALS 30, 56-59 (1986) [hereinafter GEN. ACCOUNTING OFF., MEDICAL MALPRACTICE INSURANCE COSTS]; Mullen, *Update on the Indiana Law of Medical Malpractice*, in INDIANA MEDICAL MALPRACTICE 5-13 to -14 (Ind. Continuing L. Ed. Forum, 1989).

13. Posner, *Trends in Malpractice Insurance, 1970-1985*, 37 LAW & CONTEMP. PROBS. 37 (1986); DEP'T OF HEALTH & HUMAN SERVS., REPORT OF THE TASK FORCE ON MEDICAL LIABILITY 164-165 (Aug. 1987).

14. See GEN. ACCOUNTING OFF., MEDICAL MALPRACTICE: CASE STUDY ON INDIANA (1986) [hereinafter GEN. ACCOUNTING OFF., CASE STUDY ON INDIANA].

15. See Hallinan & Headden, *A Case of Neglect: Medical Malpractice in Indiana*,

B. *The Act's Provisions*

The Act contains three major reforms: (1) a comprehensive cap on damages; (2) mandated medical review before trial; and (3) a state-run insurance fund, the Patient Compensation Fund ("PCF"), to pay large claims. Eligible health care providers, defined extensively in the statute,¹⁶ participate voluntarily by proving financial responsibility, that is, a specified level of primary malpractice insurance coverage, and by paying a surcharge on that primary coverage to finance the PCF.¹⁷ The level of primary insurance coverage for physicians and other health care providers is \$100,000 per occurrence and \$300,000 total.¹⁸ Nearly all Indiana physicians and about 90% of Indiana hospitals participate. Nonparticipants are not protected by the damage cap or the PCF.¹⁹

1. *The Cap*.—Through 1989, the cap was \$500,000.²⁰ The legislature raised the cap to \$750,000 for claims arising after January 1, 1990, out of concern that claimants with large claims be adequately compensated.²¹

2. *Medical Review Panel*.—Malpractice claimants must file their claims with the Indiana Department of Insurance and go through a medical review panel before proceeding to trial.²² Any party may request a medical review panel by filing a request with the Indiana Commissioner of Insurance.²³ As of 1985, claimants can opt out and proceed to court

Indianapolis Star, June 24, 1990, at 1; Headden & Hallinan, *State Failing to Crack Down on Malpractice*, Indianapolis Star, June 25, 1990, at 1; Hallinan & Headden, *Malpractice Laws Stacked Against Victims: Doctors, Insurance Companies Reap Biggest Benefits*, Indianapolis Star, June 26, 1990, at 1 [hereinafter Hallinan & Headden, *Malpractice Laws Stacked Against Victims*]. See also Wilkerson, *As Indiana Debates its Malpractice Law, So Does the Country*, N.Y. Times National, Aug. 20, 1990, at A11.

16. IND. CODE § 16-9.5-1-1 (1988).

17. *Id.* § 16-9.5-2-1.

18. *Id.* § 16-9.5-2-6. As of 1985, the statute set levels of annual aggregate insurance for hospitals and other health care institutions: \$2 million for small hospitals (<100 beds); \$3 million for larger hospitals; and \$700,000 for prepaid health care delivery plans. Act of Apr. 14, 1985, Pub. L. No. 177-1985, § 3, 1985 Ind. Acts 1391 (codified at IND. CODE § 16-9.5-2-6 (1988)).

19. IND. CODE § 16-9.5-1-5 (1988).

20. *Id.* § 16-9.5-2-2.

21. Act of May 2, 1989, Pub. L. No. 189-1989, 1989 Ind. Acts 1538 (codified as amended at IND. CODE § 16-9.5-2-2(a) (1990)). The Indiana State Medical Association, the Indiana Hospital Association, and the Indiana Trial Lawyers Association entered an agreement, subsequently communicated to the legislative leadership by memorandum, to support this increase in the cap and not to request support for a legislatively mandated study of the Act until after January 1, 1993. Memorandum from the Indiana State Medical Association, the Indiana Hospital Association, and the Indiana Trial Lawyers Association to Michael K. Philips, Paul S. Mannweiler, Robert D. Garton, and Dennis P. Neary (Mar. 1, 1989).

22. IND. CODE §§ 16-9.5-1-6, -9-1, -9-2, -9-2.1 (1988).

23. *Id.* § 16-9.5-9-1.

if all parties agree to forgo panel review.²⁴ Also as of 1985, claimants with claims under \$15,000 can file claims directly in court.²⁵ At any point, the parties may settle the claim. The PCF may consider and pay a claim without a medical review panel opinion.²⁶

The medical review panel is designed to provide an informal, early decision on liability, and thereby facilitate quick resolution of claims.²⁷ The panel consists of one attorney, as nonvoting chair, and three health care providers.²⁸ The parties select the chair.²⁹ Each party selects one provider panelist and the two providers select the third.³⁰ Each party may challenge the third member without cause.³¹ When requested, providers must serve on medical review panels except in cases of serious hardship.³²

The panel's sole authority is to give expert opinion on the defendant's liability, the causation of the injury, or the existence of a material issue of fact bearing on liability.³³ The panel has no role in determining damages. The panel receives evidence and reviews the discovery made by the parties and can also consult independent medical authorities.³⁴ The panel's opinion is admissible at trial, but is not conclusive evidence of liability or causation.³⁵ Either party can compel any panel member to testify at trial.³⁶ Convening the panel should take less than two months because of statutory deadlines. Once selected, the panel must meet and make its decision within 180 days.³⁷ The panel review process is designed to be completed within nine months.³⁸

3. *The Patient Compensation Fund.*—The PCF pays claims over \$100,000.³⁹ As of 1985, the PCF, like primary insurers, can make periodic

24. *Id.* § 16-9.5-9-2.

25. Act of Apr. 18, 1985, Pub. L. No. 178-1985, 1985 Ind. Acts 179, § 1 (codified as amended at IND. CODE § 16-9.5-9-2.1 (1986)).

26. IND. CODE § 16-9.5-4-3 (1988).

27. Hurlbut, *Constitutionality of the Indiana Medical Malpractice Act: Re-Evaluated*, 19 VAL. U.L. REV. 493-94 (1985); Kemper, Selby & Simmons, *Reform Revisited: A Review of the Indiana Medical Malpractice Act Ten Years Later*, 19 IND. L. REV. 1129, 1131 (1986).

28. IND. CODE § 16-9.5-9-3 (1988).

29. *Id.* § 16-9.5-9-3(a).

30. *Id.* § 16-9.5-9-3(b).

31. *Id.* § 16-9.5-9-3(b)(3).

32. *Id.* § 16-9.5-9-3.

33. *Id.* § 16-9.5-9-7.

34. *Id.* §§ 16-9.5-9-4, -6.

35. *Id.* § 16-9.5-9-9.

36. *Id.*

37. *Id.* § 16-9.5-9-3.5.

38. *Id.* §§ 16-9.5-9-3, -3.5. See also Kemper, Selby & Simmons, *supra* note 27, at 1133-35.

39. IND. CODE § 16-9.5-2-7 (1988).

payments to claimants⁴⁰ with no limit on the actual value of future payment the claimant ultimately receives.⁴¹ The PCF is administered by the Indiana Department of Insurance and financed by a surcharge on providers' primary malpractice insurance.⁴² There is a 15% limit on attorney's fees from PCF recoveries.⁴³

The primary insurer (or the uninsured health care provider) generally pays claims up to \$100,000.⁴⁴ These claims are resolved privately in the way claims customarily have been resolved under the common law tort system since the widespread advent of liability insurance.

To be eligible for PCF payment, the primary insurer of one or more defendants must settle a claim for \$100,000 or a court must enter a judgment for more than \$100,000.⁴⁵ Until 1985, one defendant had to agree to settle a case for \$100,000 before a case was eligible for the PCF, although insurers could make periodic payments.⁴⁶ However, since the 1985 legislative amendments, \$75,000 must be paid at settlement, with a future payment of \$25,000, to qualify for PCF payment.⁴⁷ Most importantly, as of 1985, more than one insurer can contribute to the requisite amount of primary insurance, although one insurer must pay at least \$50,000 at the time of settlement.⁴⁸ The cost of an annuity or similar product for a structured settlement is counted in the requisite amount of primary insurance needed to be paid before a claim is eligible for PCF consideration.⁴⁹

To obtain funds from the PCF, a claimant must file a petition in court for approval of a settlement or payment of a court judgment.⁵⁰ The other parties, the Commissioner of Insurance, or both, may contest the petition, and the court may even convene an evidentiary hearing on

40. Act of Apr. 14, 1985, Pub. L. No. 179-1985, 1985 Ind. Acts 1403 (codified as amended at IND. CODE § 16-9.5-2-2.1 to -2.4 (1988)). See Stickney, *1985 Amendments to the Indiana Medical Malpractice Act*, 19 IND. L. REV. 403, 405 (1986).

41. IND. CODE § 16-9.5-2-2.1(a) (1988).

42. *Id.* § 16-9.5-4-1.

43. *Id.* § 16-9.5-5-1.

44. *Id.* § 16-9.5-2-2(d).

45. *Id.* If a provider's aggregate insurance (*e.g.*, \$300,000) has been exhausted, the entire claim can be paid from the PCF according to a procedure that is substantially similar to that for claims above \$100,000. *Id.* § 16-9.5-2-7.

46. *Id.* § 16-9.5-4-3. See *Eakin v. Mitchell-Leech*, 557 N.E.2d 1057, 1060 (Ind. Ct. App. 1990), in which the court of appeals held that the Department of Insurance's longstanding practice, in cases arising before June 1, 1985, of permitting claimants to access the PCF when an insurer agreed to make future periodic payments with a total face value of \$100,000, but making a present payment of as little as \$10,000, satisfied the requirements of the Act.

47. IND. CODE § 16-9.5-2-2.2(b) (1988).

48. *Id.* § 16-9.5-2-2.2(c).

49. *Id.* § 16-9.5-2-2.1(b).

50. *Id.* § 16-9.5-4-3(1).

damages.⁵¹ No judicial review of a court approved settlement is available.⁵² In PCF and associated court proceedings, the liability of the health care provider is admitted.⁵³

4. *Links to the Medical Discipline System.*—The Act requires that the insurance commissioner report the settlements and judgments against health professionals to the appropriate licensure or registration boards for review of continued fitness to practice.⁵⁴ The board may then proceed with various disciplinary action, including censure, or the probation, suspension, or revocation of the professional's license.⁵⁵ In practice, the Indiana Medical Licensing Board has initiated very few disciplinary actions against physicians reported to it by the Department of Insurance because most cases are settled without a panel ever having been convened.⁵⁶ The Medical Licensing Board will only initiate such actions against those physicians found by a medical review panel to have been negligent.⁵⁷ Moreover, medical review panelists may be reluctant to conclude that one incident of malpractice out of a thousand procedures is cause for a medical disciplinary action.⁵⁸

5. *Reporting Requirements and Other Key Provisions.*—The Act also requires reporting the disposition of any malpractice claims by counsel and insurers to the Indiana Department of Insurance.⁵⁹ Specifically, key data to be reported include attorney's fees and expenses incurred in pressing or defending the claim, settlement, or judgment amounts.⁶⁰ The Act contains several other important provisions, including a shortened statute of limitations⁶¹ and the Residual Malpractice Insurance Authority for physicians unable to obtain private insurance.⁶²

C. *Judicial Interpretation of the Act*

Since 1975, over fifty judicial decisions have interpreted provisions of the Act.⁶³ Several of these decisions have addressed the Act's con-

51. *Id.* §§ 16-9.5-4-3(3), -3(5).

52. *Id.*

53. *Id.* § 16-9.5-4-3(5).

54. *Id.* § 16-9.5-6-2(a).

55. *Id.* § 16-9.5-6-2.

56. Telephone interview with Louis Belch, Director of Medical Licensing Board (Dec. 14, 1990).

57. *Id.*

58. *Id.*

59. IND. CODE § 16-9.5-6-2 (1988).

60. *Id.*

61. *Id.* § 16-9.5-3-1.

The statute of limitations has been amended to require a claimant to file a malpractice claim within two years of the alleged malpractice, although minors under age six have until age eight to file a claim. *Id.*

62. *Id.* §§ 16-9.5-8-2, -6.

63. See Brennan, *Torts, Survey of Recent Developments in Indiana Law*, 10 IND.

stitutionality.⁶⁴ In 1980, in *Johnson v. St. Vincent Hospital, Inc.*, consolidating four lawsuits, the Indiana Supreme Court definitively upheld the constitutionality of the Act.⁶⁵ Two later cases specifically addressed the constitutionality of the medical review panel process.⁶⁶ In *Cha v. Warnick*, the court of appeals reversed a trial court decision that the Act was unconstitutional because of undue delays in the medical review panel process. The court of appeals emphasized that the panel process was not significantly longer than the common law tort system in adjudicating claims.⁶⁷ In *Kranda v. Houser-Norberg Medical Corp.*, the court of appeals declined to rule that the Act violated the separation of powers doctrine because admission of the panel opinion at trial usurped courts' authority to rule on admissibility of evidence.⁶⁸

Perhaps the most important issue after the Act's constitutionality is its scope in terms of what types of conduct by a health care provider fall within the scope of the Act.⁶⁹ A crucial issue in this regard is whether the negligent conduct of hospital personnel that is nonmedical in nature is within the scope of the Act.

In an early decision, *Methodist Hospital of Indiana, Inc. v. Rioux*,⁷⁰ the Indiana court of appeals ruled that an action for damages against

L. REV. 360, 378-83 (1976); Harrigan, *Torts, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 425, 425-32 (1982); Kirtland, *Torts, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 545, 563-64 (1981); Mead, *Torts, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 377, 401-06 (1983); Ruge, *Survey of Recent Developments in Medical Malpractice Law*, 23 IND. L. REV. 415 (1990); Ruge, *Medical Malpractice*, 22 IND. L. REV. 535 (1988); Vargo, *Torts, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 341 (1984).

64. *Cha v. Warnick*, 476 N.E.2d 109 (Ind. 1985), *cert. denied*, 474 U.S. 920 (1985); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585 (Ind. 1980); *Rohrbaugh v. Wagoner*, 413 N.E.2d 891 (Ind. 1980); *Whitaker v. St. Joseph's Hosp.*, 415 N.E.2d 737 (Ind. Ct. App. 1981); *Kranda v. Houser-Norborg Medical Corp.*, 419 N.E.2d 1024 (Ind. Ct. App. 1981), *reh'g denied*, 424 N.E.2d 1064 (Ind. 1981), *appeal dismissed*, 459 U.S. 802 (1982); *Lee v. Lafayette Home Hosp.*, 410 N.E.2d 1319 (Ind. Ct. App. 1980); *cf. Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421 (N.D. Ind.), *aff'd*, 603 F.2d 646 (7th Cir. 1979). See Comment, *Constitutionality of the Indiana Medical Malpractice Act: Re-Evaluated*, 19 VAL. U.L. REV. 493 (1985).

65. 273 Ind. 374, 392, 404 N.E.2d 585, 497 (1980).

66. *Cha v. Warnick*, 476 N.E.2d 109 (Ind. 1985), *cert. denied*, 474 U.S. 920 (1985); *Kranda v. Houser-Norborg Medical Corp.*, 419 N.E.2d 1024 (Ind. Ct. App. 1981), *reh'g denied*, 424 N.E.2d 1064 (Ind. 1981), *appeal dismissed*, 459 U.S. 802 (1982).

67. *Cha*, 476 N.E.2d 109 (Ind. 1985), *cert. denied*, 474 U.S. 920 (1985).

68. 419 N.E.2d 1024 (Ind. Ct. App. 1981), *reh'g denied*, 424 N.E.2d 1064 (Ind. 1981), *appeal dismissed*, 454 U.S. 802 (1982).

69. See Harbottle, *The Proper Scope of Claimant Coverage under the Indiana Medical Malpractice Act*, 23 IND. L. REV. 899 (1990); Kemper, Selby & Simmons, *supra* note 27, at 1138-1139.

70. 438 N.E.2d 315 (Ind. Ct. App. 1982).

a hospital for ordinary negligence arising from an incident where a patient fell from a bed and broke her hip fell within the scope of the Act. However, beginning with *Winona Memorial Foundation v. Lomax*,⁷¹ Indiana courts generally have taken the position that hospital premises liability is outside the Act's scope.⁷² The rationale for this position, as stated by the *Lomax* court, is that the availability of malpractice insurance and liability insurance for nonmedical accidents is unrelated; thus, liability for ordinary negligence does not interfere with the Act's purpose to assure the continued delivery of health care services.⁷³ Further, premises liability is ordinary negligence within the common knowledge and experience of jurors for which proof of medical expertise is unnecessary. In *Methodist Hospital of Indiana, Inc. v. Ray*,⁷⁴ the court of appeals reaffirmed this position, concluding that the Act does not cover every patient-provider relationship. In this case, the plaintiff contracted Legionnaire's Disease while in the defendant's hospital.

In other situations, Indiana courts have interpreted the scope of the Act more broadly. For example, in *Ogle v. St. John's Hickey Memorial Hospital*,⁷⁵ the court of appeals ruled that a patient's negligence action against a psychiatric hospital for failing to supervise another patient who raped the plaintiff fell within the Act because the plaintiff's confinement was an integral part of the diagnosis and treatment of her condition. Further, in two cases in which the plaintiff challenged a civil commitment arranged by a spouse and a physician who never examined the patient, Indiana courts ruled that the actions had to be brought under the Act.⁷⁶

More recently, third party claims for negligence have come under scrutiny with respect to the scope of the Act. In *Midtown Community Mental Health Center v. Estate of Gahl*,⁷⁷ the court of appeals held that a third party's wrongful death claim alleging negligent treatment of a patient and failure to warn the deceased of the patient's dangerous propensity does not come within the purview of the Act because the estate is neither the patient nor a party whose claim was derived from

71. 465 N.E.2d 731 (Ind. Ct. App. 1984).

72. *Id.* at 737; *Harts v. Caylor-Nickel Hosp., Inc.*, 553 N.E.2d 874 (Ind. Ct. App. 1990); *Methodist Hospital of Indiana, Inc. v. Ray*, 551 N.E.2d 463 (Ind. Ct. App. 1990). *But see* *Methodist Hospital of Indiana, Inc. v. Rioux*, 438 N.E.2d 315 (Ind. Ct. App. 1982).

73. *Lomax*, 465 N.E.2d at 738, 739 n.6.

74. 511 N.E.2d 463 (Ind. Ct. App. 1990), *aff'd*, 558 N.E.2d 829 (Ind. 1990).

75. 473 N.E.2d 1055 (Ind. Ct. App. 1985).

76. *See* *Detterline v. Bonaventura*, 465 N.E.2d 215 (Ind. Ct. App. 1984); *Scrubby v. Waugh*, 476 N.E.2d 533 (Ind. Ct. App. 1985). *See* Harbottle, *supra* note 69, at 918-20.

77. 540 N.E.2d 1259, 1262 (Ind. Ct. App. 1989). *See* Harbottle, *supra* note 69 (focusing on this case).

the patient. This decision distinguished an earlier case, *Sue Yee Lee v. Lafayette Home Hospital, Inc.*,⁷⁸ in which the court of appeals ruled that a third party derivative claim by a parent for loss of services of a child and medical expenses of a minor child against a medical provider must comply with the Act.

Similarly, in *Webb v. Jarvis*,⁷⁹ a shooting victim brought a negligence action against the physician of the assailant, alleging that the physician had breached his duty by negligently overmedicating the assailant to a level of toxic psychosis. In essence, *Midtown* and *Webb* stand for the proposition that the Act does not apply to the risk of liability a health care provider faces when a patient commits some tortious act against a third party.

Another key issue regarding the Act's applicability arises when some ancillary tortious conduct unrelated to the promotion of the patient's health occurs within the physician-patient relationship. In *Collins v. Thakkar*, the court concluded that a plaintiff's complaint alleging wrongful abortion, assault and battery, and intentional infliction of emotional distress did not come within the scope of activity intended to be included under the Act.⁸⁰ The court, carefully limiting its holding to the alleged facts, cautioned that its decision did not apply generally to a class of intentional torts occurring within the physician-patient relationship, and emphasized that the complaint contained factual issues that could be decided by a jury without medical expert testimony.⁸¹

In sum, Indiana courts have played, and continue to play, a dynamic role in defining the function and extent of the Act's provisions. While the constitutionality of the Act seems well settled, at least with the current Indiana Supreme Court, other problematic issues remain — most notably the scope of the Act with respect to what type of conduct the courts believe the legislature intended to encompass.

In such cases, as one court observed, conclusions about the Act's scope depend on assumptions about the breadth of the legislature's intent.⁸² Nevertheless, while the specific rationale in individual cases about excluding certain conduct from the Act may make sense for those cases, they pose problems for future litigants in selecting a forum in which to bring their actions in questionable instances, and they also provide opportunities for the imposition of procedural hurdles in malpractice and related litigation. Consequently, Indiana courts would be well advised to

78. 410 N.E.2d 1319 (Ind. Ct. App. 1980).

79. 553 N.E.2d 151 (Ind. Ct. App. 1990).

80. 552 N.E.2d 507, 510 (Ind. Ct. App. 1990)

81. *Id.* at 511.

82. *Methodist Hosp. of Ind., Inc. v. Ray*, 551 N.E.2d 463, 465 (Ind. Ct. App. 1990); see also Harbottle, *supra* note 69, at 904-07.

look carefully at situations that might be excluded from the Act, particularly for those torts arising directly in the physician-patient relationship such as in *Collins v. Thakkar*.⁸³ Even in *Methodist Hospital of Indiana, Inc. v. Ray*, the line between premises liability and liability for medical malpractice is not necessarily clear because the risk of viral infection may be intrinsically related to the delivery of health care in a hospital setting.

III. INDIANA'S EXPERIENCE UNDER REFORMS

This section reviews data on the operation of Indiana's malpractice reforms as well as data on Indiana claimants, defendants, and claims from 1975 through 1988. The Indiana University study collected data on all malpractice claims filed with the Indiana Department of Insurance from 1975 through 1988.⁸⁴

A. General Trends

From 1975 through 1988, 6,225 malpractice claims were filed with the Indiana Department of Insurance.⁸⁵ Of these claims, only 2,074 were closed.⁸⁶ It is remarkable that, under Indiana's reforms, less than one-third of claims filed were closed over a twelve-year period. The implications of this backlog will be discussed below.⁸⁷

1. *Frequency and Severity*.—The key characteristics of claims affecting the availability and affordability of medical malpractice insurance are frequency and severity (that is, size) of claims. Increases in these characteristics triggered the two malpractice crises of the 1970s and 1980s.⁸⁸ Further, most legislated tort and insurance reforms, including Indiana's, are aimed at controlling the frequency and severity of claims.⁸⁹ Indiana's trends in frequency and severity of claims from 1975 through 1988 were

83. 552 N.E.2d 507 (Ind. Ct. App. 1990).

84. See description of database in Appendix A.

85. IND. DEP'T OF INS., INDIANA PATIENT'S COMPENSATION FUND AS OF DECEMBER 31, 1988 at 3 (1988) [hereinafter IND. DEP'T OF INS., INDIANA PATIENT'S COMPENSATION FUND].

86. *Id.*

87. See *infra* § III(D)(2).

88. F. SLOAN & R. BOVBJERG, MEDICAL MALPRACTICE: CRISES, RESPONSE AND EFFECTS 7 (Health Ins. Assoc. of America: Washington D.C. 1989); Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 57 (1986) [hereinafter Danzon, *New Evidence*]; Robinson, *The Medical Malpractice Crisis of the 1970s: A Retrospective*, 49 LAW & CONTEMP. PROBS. 5 (1986); Sloan, *State Responses to the Malpractice Insurance "Crisis" of the 1970s: An Empirical Assessment*, 9 J. HEALTH POL. POL'Y & L. 629 (1985).

89. F. SLOAN & R. BOVBJERG, *supra* note 88, at 13-14.

similar to those of the nation.⁹⁰ Like other states, Indiana has experienced increases in claim frequency during the 1980s despite reforms. Table I presents data on new claims opened per physician from 1977 through 1988. Claim frequency in Indiana rose from 2.2 claims per 100 physicians in 1977, to 9.7 in 1986, to 8 per 100 physicians in 1987. These trends are similar to national trends, although annual frequency is actually lower in Indiana compared to the nation.⁹¹

TABLE I

SEVERITY AND FREQUENCY OF INDIANA MALPRACTICE CLAIMS, 1977-1988

Year	Mean Paid Claim Current \$	Mean Paid Claim Constant 1977 \$	Claims Per 100 Physicians ¹
1977	\$ 4,166	\$ 4,166	2.2
1978	53,760	49,935	4.1
1979	79,531	66,398	4.7
1980	74,264	54,615	5.7
1981	26,625	17,740	6.1
1982	85,674	53,731	7.6
1983	111,719	67,952	8.3
1984	128,511	74,975	9.0 ²
1985	135,925	76,569	9.7
1986	186,387	103,012	8.5
1987	220,697	117,674	8.0
1988	37,988	19,460	— ³

Source: Indiana Malpractice Claims Data Base, The Center for Law and Health, Indiana University School of Law—Indianapolis, 1990.

¹ Indiana Department of Insurance, American Medical Association, 1988.

² AMA physician data unavailable for 1984 — figure obtained by taking average of 1983 and 1985.

³ AMA physician data not yet available for 1988.

90. *Id.* at 6-8.

91. *Id.* at 7 (Figure 2). *See also* GEN. ACCOUNTING OFF., SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS (1986) [hereinafter GEN. ACCOUNTING OFF., SIX CASE STUDIES]; GEN. ACCOUNTING OFF., CASE STUDY ON INDIANA, *supra* note 14.

Between 1975 and 1988, the mean claim severity in current dollars for paid Indiana claims was \$130,855 (\$89,350 for all claims). The median was \$14,000. The mean paid claim in 1977 constant dollars was \$73,566 and the median was \$7,684. A study combining data collected by the National Association of Insurance Commissioners⁹² and the United States General Accounting Office ("GAO")⁹³ reported mean severity for paid claims at \$102,313, using 1984 constant dollars.⁹⁴

Claim severity in Indiana has also increased substantially over time. Table I presents data on mean paid claim severity from 1977 through 1988.⁹⁵ Claim severity in Indiana rose 88.6% in real dollars between 1980 and 1986. As with claim frequency, Indiana's experience with claim severity has been similar to national trends, despite reforms.⁹⁶

2. *Unique Patterns in Indiana Claim Severity.*—About 32% of the closed claims were settled without payment, a figure considerably smaller than the 57% found by the GAO in its study of claims closed in 1984.⁹⁷ This difference is interesting, and suggests that the operation of Indiana's malpractice reforms may negatively influence the initial decisions of plaintiffs' attorneys to bring a claim or, on the other hand, may promote a more expansive view toward settlement by malpractice insurers.

The distribution of Indiana's mean paid claim severity is especially interesting. Specifically, very few paid Indiana claims were settled between \$25,000 and \$100,000, 12% compared with the national data in the GAO's 1984 study of closed claims (28.5%).⁹⁸ In fact, only 3.0% of all closed claims (54 claims) were between \$50,000 and \$100,000, and only 0.5% of all closed claims (14 claims) were between \$75,000 and \$100,000. It seems remarkable that only 54 claims out of 2,074 claims would fall between \$50,000 and \$100,000. This suggests that an interesting phenomenon may be influencing the resolution of Indiana's claims.

92. NAT'L ASS'N OF INS. COMM'RS, MALPRACTICE CLAIMS, FINAL COMPILATION, MEDICAL MALPRACTICE CLOSED CLAIMS 1975-1978, Vol. 2, No. 2 (Sept. 1980).

93. GEN. ACCOUNTING OFF., CHARACTERISTICS OF CLAIMS CLOSED IN 1984 (1987).

94. Sloan, Mergenhagen, & Bovbjerg, *Effects of Tort Reforms on the Value of Closed Medical Malpractice Claims: A Microanalysis*, 14 J. HEALTH POL. POL'Y & L. 663, 688 (1989).

95. Although data on closed claims included claims filed as early as 1975, none of these earlier claims were settled before 1977. Also, the table "endpoints" (1977 and 1988) are excluded from consideration because the number of claims settled in those years was much lower than the number of claims settled from 1978 through 1987.

96. F. SLOAN & R. BOVBJERG, *supra* note 88, at 7.

97. GEN. ACCOUNTING OFF., CHARACTERISTICS OF CLAIMS CLOSED IN 1984, *supra* note 93, at 19.

98. *Id.* at 20.

Large Indiana claims (>\$100,000) constituted 30.2% compared with 18.3% in the GAO study.⁹⁹ Yet, the proportion of small claims (<\$25,000) in Indiana (57.9%) and the GAO study (53.2%) was similar.¹⁰⁰ This different pattern of Indiana's mean paid claim severity is very important and, as will be discussed below, suggests that Indiana's system may be working in an unusual manner.¹⁰¹

3. *Claim Disposition Time.*—From 1975 through 1988, an average of 23.7 months elapsed between the time a claim was filed and its closure, with virtually no difference between paid and nonpaid claims. Interestingly, Indiana's average was almost two months shorter than the time stated in the GAO study of 1984.¹⁰² Like other national studies discovered,¹⁰³ larger claims in Indiana took longer than smaller claims.

B. *Characteristics of Indiana Malpractice Claimants and Claims*

The study sought to collect considerable data on malpractice claimants in Indiana. However, the claim files at the Indiana Department of Insurance actually contained very little demographic data on claimants. Only data on age and sex was present on a widespread basis.

1. *Demographic Characteristics of Claimants.*—

a. *Claimant sex*

Of Indiana malpractice claimants, 59.5% were female and 40.5% male. While this represents a statistically significant difference from Indiana's population generally, it is quite similar to the percentages of 56.9% and 43.1% found in the 1984 GAO study of closed claims.¹⁰⁴ It is well documented that women use more health care services on average than do men, due in part to childbearing needs.¹⁰⁵ This fact may explain the disproportionately large representation of women among malpractice claimants.

Men, however, tended to have larger awards than women, receiving nearly \$105,909 on average for all closed claims compared to \$78,887 for

99. *Id.*

100. *Id.*

101. *See infra* §§ III(D)(1) and IV(A).

102. GEN. ACCOUNTING OFF., CHARACTERISTICS OF CLAIMS CLOSED IN 1984, *supra* note 93, at 35 (25.1 months). *See also* Sloan, Mergenhagen & Bovbjerg, *supra* note 94, at 688 (1.97 years).

103. GEN. ACCOUNTING OFF., CHARACTERISTICS OF CLAIMS CLOSED IN 1984, *supra* note 93, at 35.

104. *Id.* at 28.

105. L. ADAY, R. ANDERSON & G. FLEMMING, HEALTH CARE IN THE UNITED STATES: EQUITABLE FOR WHOM? 104 (Table 3.4) (1980).

women. For paid claims, the mean payment for men was \$157,709 and \$114,188 for women, a highly significant difference.¹⁰⁶ This difference suggests that, in practice, male work and lives are valued higher than female work and lives. Independent of malpractice, this is an extremely disturbing finding which strongly suggests that the legal system reinforces underlying social inequities.

b. Claimant age

Data on claimant age showed that the ages of Indiana claimants were relatively similar in distribution to the age data reported by GAO.¹⁰⁷ Newborns received the highest mean award of any age category, although they were among the smallest age category (6.4%). This is due, almost certainly, to the fact that injuries suffered at birth are likely to require expensive, often lifelong, care. Other differences between age groups were not significant.

c. Claimant race

Although data on race was missing in 72.9% of claims closed between 1975 and 1988, the racial composition of Indiana malpractice claimants appears to be similar to Indiana's population generally. According to 1984 census data, whites and nonwhites constituted 91.41% and 8.59% of Indiana's population respectively.¹⁰⁸ Of closed claims, 85.7% of claimants were white, and 14.3% were Black, Asian, or Hispanic.

d. Marital status

Data on marital status was available in only a little more than one-third of all cases. Nearly 93% of adult claimants (defined as those claimants 18 years or older) were married or had been married at some time.

e. Employment

Data on the claimant's employment status at time of injury was recorded in almost 55% of the closed claims. Most claimants (61.5%) were employed. Dependent children and students (23.4%) constituted the next highest category, followed by homemakers (5.8%). Only 2.7% of the claimants were unemployed at the time of injury. The remainder of claimants were either self-employed, retired, independent students, or classified as "other."

f. Claimant county of residence.

Data on claimant residence was often missing from the Department of Insurance claim files. Nevertheless, data was available for nearly half

106. The difference is significant at $p < .001$.

107. GEN. ACCOUNTING OFF., CHARACTERISTICS OF CLAIMS CLOSED IN 1984, *supra* note 93, at 28.

108. U.S. BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK, 1988, U.S. GOVERNMENT PRINTING OFFICE (1988).

(46.8%) of the closed claims between 1975 and 1988. Of these claimants, the largest portion, 20.5%, were from Marion County, followed by 12.8% from Lake County, 3.6% from Allen County, and 3.3% from St. Joseph County. Overall, 68.7% of the claimants lived in urban counties, that is, Standard Metropolitan Statistical Areas.¹⁰⁹ Claimants from rural areas accounted for 25.6% of claims. Of the 5.7% of the claimants residing outside Indiana, Illinois residents outnumbered Ohio, Kentucky, and Michigan residents by nearly half.

2. *Claim Characteristics.*—Most malpractice injuries in Indiana from 1975 through 1988 occurred in hospitals (67.9% versus 22.2% in physicians' offices or clinics). The GAO found that 80% of malpractice injuries occur in hospitals compared to 13% in physicians' offices.¹¹⁰

The predominant allegation of negligence for closed claims in Indiana was errors in treatment, followed by errors in surgery and errors in diagnosis. The GAO's study of claims closed in 1984 found a similar pattern.¹¹¹

Further, the distribution of severity of injury closely parallels the distribution reported by the GAO study and, as in that study, award size varied directly with severity.¹¹² Nearly 60% of paid wrongful death claims received payments in excess of \$100,000 — a proportion much greater than the claims of living claimants. Table II presents data on the mean claim severity (size) and severity of injury index for all closed claims by allegations of negligence.

C. *Characteristics of Indiana Malpractice Defendants*

Physicians and hospitals account for about 80% of the 4,230 malpractice defendants in the closed claims under Indiana's malpractice reforms through 1988. Of all varied defendants, nearly 60% were individual physicians, 7.4% were physician professional corporations, 8% were other health professionals, and 25.1% were hospitals and other health care institutions. More than 75% of the claims involved just one or two defendants. This is logical because one defendant must pay \$100,000 to get a claim to the PCF, or at least \$50,000 in a structured settlement.¹¹³

109. *Id.*

110. GEN. ACCOUNTING OFF., CHARACTERISTICS OF CLAIMS CLOSED IN 1984, *supra* note 93. See also Sloan, Mergenhagen, & Bovbjerg, *supra* note 94, at 688 (app. 2).

111. GEN. ACCOUNTING OFF., CHARACTERISTICS OF CLAIMS CLOSED IN 1984, *supra* note 93, at 23.

112. *Id.* at 41. See also Bovbjerg, Sloan, Dor & Hsieh, *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?*, LAW & CONTEMP. PROBS. (forthcoming 1991); Sloan & Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation Fair?*, 24 L. & SOC'Y REV. 997 (1990).

113. See *supra* notes 45-49 and accompanying text.

TABLE II
MEAN PAYMENT AND MEAN SEVERITY OF INJURY (SI) BY
ALLEGATIONS OF NEGLIGENCE FOR ALL CLOSED INDIANA CLAIMS, 1977-1988

Allegations of Negligence	PCF ≥ \$100,000		\$25,000 - \$99,999		\$1 - \$24,999		\$0	
	Payment (N)	SI'	Payment(N)	SI	Payment (N)	SI	Payment(N)	SI
CLAIMS OF LIVING CLAIMANTS								
Diagnosis	413,252 (36)	6.6	37,050 (10)	5.1	4,809 (79)	4.4	0 (73)	4.5
Anesthesia	471,001 (10)	7.5	25,000 (1)	5.0	3,605 (9)	4.4	0 (1)	5.0
Surgery	378,052 (80)	5.6	39,131 (48)	4.8	7,047 (167)	4.4	0 (165)	4.6
Medication	385,000 (7)	5.9	39,500 (5)	5.2	3,466 (18)	4.0	0 (17)	4.4
Medication								
Administration	359,615 (8)	5.9	40,017 (5)	4.2	4,975 (18)	4.4	0 (8)	4.3
Intravenous	364,375 (4)	6.3	50,000 (1)	6.0	6,801 (9)	4.6	0 (2)	4.5
Obstetrics	473,583 (47)	7.5	46,479 (11)	4.3	6,677 (59)	2.4	0 (38)	3.5
Treatment	403,560 (59)	6.3	41,167 (37)	5.2	5,349 (213)	4.2	0 (187)	4.7
Monitoring	440,951 (10)	6.5	-----	---	3,650 (5)	4.0	0 (3)	6.0
Equipment	370,401 (24)	6.4	38,500 (5)	4.6	5,113 (34)	4.1	0 (14)	3.9
Blood Products	-----	---	26,250 (2)	4.5	2,000 (4)	4.8	0 (2)	4.5
Other	344,675 (9)	6.0	39,070 (11)	4.5	6,734 (121)	4.1	0 (59)	3.5
WRONGFUL DEATH CLAIMS								
Diagnosis	420,008 (31)	9.0	40,666 (6)	9.0	9,566 (12)	9.0	0 (14)	9.0
Anesthesia	420,357 (21)	9.0	62,250 (2)	9.0	11,333 (6)	9.0	0 (2)	9.0
Surgery	332,742 (10)	9.0	55,000 (2)	9.0	10,050 (5)	9.0	0 (4)	9.0
Medication	400,000 (2)	9.0	-----	---	8,250 (2)	9.0	0 (2)	9.0
Medication								
Administration	316,666 (3)	9.0	-----	---	-----	---	0 (1)	9.0
Intravenous	417,500 (2)	9.0	-----	---	-----	---	-	---
Obstetrics	442,942 (6)	9.0	37,100 (5)	9.0	20,250 (2)	9.0	0 (6)	9.0
Treatment	425,086 (28)	9.0	54,791 (12)	9.0	7,488 (27)	9.0	0 (37)	9.0
Monitoring	389,016 (14)	9.0	80,000 (1)	9.0	7,333 (3)	9.0	0 (2)	9.0
Equipment	348,546 (3)	9.0	-----	---	2,000 (1)	9.0	0 (1)	9.0
Blood Products	315,001 (1)	9.0	96,000 (1)	---	8,750 (2)	9.0	0 (1)	9.0
Other	407,500 (5)	9.0	35,076 (1)	---	3,593 (8)	9.0	0 (3)	9.0

SOURCE: Indiana Malpractice Claims Data Base, The Center For Law and Health, Indiana University School of Law - Indianapolis, 1990.

See Appendix A for description of severity of injury index.

Of the total number of physician defendants, 12.5% were named in two or more closed claims. Specifically, 230 physician defendants were named in two claims; forty-six were named in three claims; fifteen were named in four claims; seven were named in five claims; and three were named in six claims.

For almost 54% of physician defendants, no settlement or judgment was made. Table III presents data on the mean claim payments by defendant physicians' specialty. As Table III shows, about one-third of physician defendants in Indiana were OB/GYNs, general surgeons, or orthopedic surgeons, as is true nationally.¹¹⁴

Of all specialties, OB/GYNs were the largest single group of malpractice defendants (14.5), with general surgeons a close second (14.2). These specialty groups, along with anesthesiologists, orthopedic surgeons, and radiologists, were over-represented compared to their proportion in Indiana's physician population. Physicians in family practice, internal medicine, and psychiatry were under-represented.¹¹⁵

Approximately 55% of the Indiana physician defendants were board certified compared to 50% reported in the GAO study.¹¹⁶ About 20% of the Indiana physician defendants were educated in foreign medical schools compared to 23% foreign-educated defendants nationally.¹¹⁷ There were no statistically significant differences in mean severity of paid claims between board certified physicians and nonboard certified physicians, nor between foreign medical graduates and physicians educated in the United States.¹¹⁸ For claims decided by a medical review panel, there was no statistically significant difference between board and nonboard certified physicians nor between foreign medical graduates and physicians educated in the United States and Canada in terms of whether the panel found physicians negligent.

114. GEN. ACCOUNTING OFF., CHARACTERISTICS OF CLAIMS CLOSED IN 1984, *supra* note 93, at 55.

115. These trends are similar to results of a study of Florida physician defendants. Sloan, Mergenhagen, Burfield, Bovbjerg & Hassan, *Medical Malpractice Experience of Physicians: Predictable or Haphazard?*, 262 J. AM. MED. A. 3291-94 (1989).

116. GEN. ACCOUNTING OFF., CHARACTERISTICS OF CLAIMS CLOSED IN 1984, *supra* note 93, at 58.

117. *Id.* at 59.

118. Board certified physicians and foreign medical graduates were associated with slightly higher average claim payments, though no information on how much each defendant paid was available.

TABLE III

CLAIM AND DEFENDANT CHARACTERISTICS BY PHYSICIAN SPECIALTY
1977-1988

	% Phys. Defend. (N)	% IN ¹ Phys.	% All Paid ² Claims (N)	Mean	Paid Claims ³ Median (N)
OB/GYN	14.5 (335)	5.4	72.9 (240)	\$ 70,683	\$ 10,000 (56)
General					
Surgery	14.2 (327)	7.0	65.5 (213)	126,841	25,000 (61)
Orthopedic					
Surgery	10.0 (230)	3.6	56.1 (128)	79,232	10,000 (44)
Radiology	9.6 (107)	2.1	67.3 (72)	170,125	8,750 (6)
General					
Practice	8.9 (205)	8.2	62.5 (125)	117,857	8,750 (48)
Family					
Practice	8.8 (203)	15.3	62.6 (127)	139,934	21,250 (30)
Internal					
Medicine	5.4 (124)	12.7	61.3 (76)	155,050	32,000 (6)
Anesthesiology	5.4 (124)	6.0	87.1 (108)	341,127	375,000 (9)
Urology	2.9 (68)	1.9	64.7 (44)	134,536	5,000 (17)
Pediatrics	2.5 (58)	5.5	75.4 (43)	15,300	15,300 (2)
ER Medicine	2.5 (58)	3.0	78.9 (45)	4,812	5,125 (4)
Ophthalmology	2.3 (52)	2.9	50.0 (25)	110,928	45,000 (14)
Neurosurgery	2.3 (53)	0.7	51.9 (27)	120,425	2,750 (4)
Otolaryngology	1.9 (43)	1.7	60.5 (26)	185,699	90,000 (11)
Plastic					
Surgery	1.1 (25)	0.6	60.0 (15)	78,640	9,500 (11)
Psychiatry	1.4 (33)	4.0	46.9 (15)	113,415	1,455 (4)
Pathology	0.9 (20)	3.5	75.0 (15)	20,000	20,000 (1)
Other	10.6 (244)	15.9	63.1 (152)	172,108	20,000 (34)

SOURCE: Indiana Malpractice Claims Data Base, The Center for Law and Health, Indiana University School of Law -- Indianapolis, 1990.

¹ Distribution of physician defendants by specialty differs significantly from distribution of Indiana physicians. (chi-squares = 1,293, $p < .001$).

² Figure represents the number of specialist physicians involved in a paid claim whether or not the specialist actually contributed to the payment.

³ Number of paid claims involving only one physician provider.

Hospitals constituted approximately one-fourth of the defendants in all Indiana closed claims from 1975 to 1988. Private, nonprofit hospitals accounted for 69.9% of institutional defendants, a proportion substantially higher than their representation among Indiana's acute care hospitals (48.1%). On the other hand, public hospitals made up only 29.4% of institutional defendants and for-profit hospitals comprised 0.2%. Of Indiana acute care hospitals, 45.1% are public and 6.8% are investor-owned.¹¹⁹

D. Performance of the System

1. *Operation of the Cap.*—The major issue regarding the Act is the fairness of Indiana's comprehensive damage cap. Intuitively, comprehensive damage caps seem unfair to plaintiffs with large claims because they impose limits on compensation that bear no relation to the plaintiff's actual damages. Indeed, several state courts have invalidated damage caps on grounds that they deny plaintiffs their property rights.¹²⁰ Nevertheless, empirical research repeatedly has demonstrated that damage caps are one of the few tort reforms that are effective in reducing the severity of malpractice claims.¹²¹

In assessing the operation of Indiana's cap, comparisons with two neighboring states regarding large (>\$100,000) malpractice claims are

119. AM. HOSP. ASS'N, GUIDE TO THE HEALTH CARE FIELD: 1988 EDITION A119-A124 (1989).

120. See, e.g., *Waggoner v. Gibson*, 647 F. Supp. 1102 (N.D. Tex. 1986); *Wright v. Cent. DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980). But see, e.g., *Boyd v. Virginia*, 877 F.2d 1191, rev'g, 647 F. Supp. 781 (W.D. Va. 1986); *Jones v. State Bd. of Med.*, 97 Idaho 859, 555 P.2d 399 (Idaho 1976); *Lamark v. NMF Hospitals, Inc.*, 542 So. 2d 753 (La. Ct. App.), cert denied, 551 So. 2d 1334 (1989); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977); *Etheridge v. Medical Center Hosp.*, 237 Va. 87, 376 S.E.2d 525 (1989). See also *Oliverio, To Cap or Not to Cap Damage Awards: That is the Constitutional Question*, 91 W. VA. L. REV. 519 (1988); *Vezina, Constitutional Challenges to Caps on Tort Damages: Is Tort Reform the Dragon Slayer or Is It the Dragon?*, 42 ME. L. REV. 218 (1990); *Wagner & Reiter, Damage Caps in Medical Malpractice: Standards of Constitutional Review*, 1987 DET. C.L. REV. 1005 (1987).

121. P. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY (1985) [hereinafter P. DANZON, MEDICAL MALPRACTICE]; Danzon, *New Evidence*, *supra* note 88; Zuckerman, Bovbjerg & Sloan, *Effects of Tort Reforms and Other Factors on Medical Malpractice Insurance Premiums*, 27 INQUIRY 167 (1990); cf. Sloan, Mergenhagen, & Bovbjerg, *supra* note 94.

Danzon found that caps on damages reduce the average severity of the claim by 23%. Danzon, *New Evidence*, *supra* note 88, at 78. More recently, Sloan, Mergenhagen and Bovbjerg found that damage caps on total payments achieved savings in claim payment of up to 39%. Sloan, Mergenhagen & Bovbjerg, *supra* note 94, at 678.

instructive.¹²² Unlike Indiana, Michigan and Ohio have adopted malpractice reforms only sporadically and never have implemented a damage cap.¹²³ Yet, with respect to other, more general, tort reforms, all three states are similar.¹²⁴ In terms of aggregate variables identified as having an important influence on claim severity, Indiana, Michigan, and Ohio are reasonably similar. These variables include: Level of urbanization;¹²⁵ number of physicians per 100,000;¹²⁶ per capita income;¹²⁷ and, the ratio of surgeons to all physicians.¹²⁸ With respect to these variables, Indiana is lower than either Michigan or Ohio.¹²⁹ Thus, one would expect that claim payments in Indiana would be lower than in either Michigan or Ohio.

In fact, the amount of compensation to claimants with large malpractice payments in Indiana is, on average, substantially higher than in Michigan and Ohio.¹³⁰ Indiana's mean large claim payment (>\$100,000) between 1975 and 1988, in current dollars, was \$404,832;

122. Gronfein & Kinney, *Controlling Large Medical Malpractice Claims: The Unexpected Impact of Damage Caps*, J. HEALTH POL. POL'Y & L. (forthcoming 1991).

123. In 1975, Michigan authorized voluntary, binding arbitration in lieu of a court trial, but this arbitration alternative has not been used to any extent. MICH. COMM'R OF INS., CLAIMS EXPERIENCE AND MARKET CONDITIONS FOR MEDICAL MALPRACTICE INSURANCE 26 (1989). In 1975, Ohio enacted a \$200,000 limit on noneconomic damages except for wrongful death, and mandated compulsory arbitration of malpractice claims. The Ohio Supreme Court immediately ruled that these reforms were unconstitutional, and thus they were never implemented. *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903, 911 (1976).

124. Michigan, Ohio, and Indiana have adopted the two tort reforms, *i.e.*, shortened statutes of limitations and modification of the common law collateral source rule, which Danzon found effective in reducing claim frequency and severity. P. DANZON, MEDICAL MALPRACTICE, *supra* note 121, at 166, 174; Danzon, *New Evidence*, *supra* note 88, at 71-72. All three states tightened their statutes of limitations for malpractice in the mid-1970s. IND. CODE § 16-9.5-3-1 (1988); MICH. COMP. LAWS § 600.5805 (1989); OHIO REV. CODE ANN. § 2305.10 (Anderson 1988). Also, all of these laws modified the common-law collateral source rule to require some offset of collateral payments from damage awards in the late 1980s, although Ohio's rule does not apply to medical malpractice. IND. CODE § 34-4-36-1 to -3 (1988); MICH. COMP. LAWS ANN. § 600.6301 (West 1987); OHIO REV. CODE ANN. § 2317.45 (Anderson Supp. 1988).

125. Danzon, *New Evidence*, *supra* note 88, at 69.

126. P. DANZON, MEDICAL MALPRACTICE, *supra* note 121, at 70-72.

127. Feldman, *The Determinants of Medical Malpractice Incidents: Theory of Contingency Fees and Empirical Evidence*, 8 ATLANTIC ECON. J. 59, 61-62 (1979).

128. Danzon, *New Evidence*, *supra* note 88, at 74, 79.

129. Gronfein & Kinney, *supra* note 122.

130. *Id.* Data on Michigan and Ohio claims included large claims (>\$100,000) filed with the Medical Protective Company in Fort Wayne, Indiana, from 1977 through 1988. For the relevant period, the Medical Protective Company had about one-third of the market in Michigan and Ohio.

Michigan's was \$290,022; and Ohio's was \$303,220.¹³¹ The median payment for large claims (>\$100,000) was \$435,283 in Indiana; \$180,000 in Michigan; and \$200,000 in Ohio.¹³² Further, 27.9% of Indiana PCF cases received the maximum allowable payment of \$500,000, while only 13% of Michigan and Ohio claims were paid at this level or above.¹³³

2. *Medical Review Panel.*—Surprisingly, medical review panels were invoked in only 11.7% of closed claims.¹³⁴ For more than half of the PCF defendants (52%) for whom the PCF paid claims, a medical review panel was not convened. Of the defendants in closed claims whose cases were considered by a medical review panel, only 189 (22.4%) were found to have committed malpractice. However, panels had been convened in 1,452 additional claims that remained opened as of December 31, 1988.¹³⁵ A crucial question for Indiana's system, which will be discussed further below,¹³⁶ is why so many claims remain open after a panel opinion is rendered.

One reason for these findings regarding the limited use of the medical review panel process in closed claims is that it has increasingly proven to be time consuming. From 1975 through 1988, the average time period between the filing of a complaint and a final panel opinion was thirty-two months.¹³⁷ Some anecdotal evidence suggests that delays in forming and convening medical review panels are responsible for delays in the resolution of malpractice claims,¹³⁸ and perhaps may be responsible for the large backlog in open claims described above.¹³⁹

These findings are quite interesting given the role the medical review panel was to play in affording accessible expert review to determine liability early in a claim. The medical review panel in fact plays a much reduced role in the adjudication of malpractice claims. To the extent that delays in convening medical review panels contribute to the fact that only one-third of filed claims were closed from the start of reforms in 1975 through 1988, such evidence could be quite persuasive in a future constitutional challenge to Indiana's reforms with respect to the court of appeals decision in *Cha v. Warnick* discussed above.¹⁴⁰

131. *Id.* The difference between these three means was highly significant at <.001.

132. *Id.*

133. *Id.*

134. IND. DEP'T OF INS., INDIANA PATIENT'S COMPENSATION FUND, *supra* note 85, at 3.

135. *Id.*

136. *See infra* § IV(B)(2).

137. IND. DEP'T OF INS. INDIANA PATIENT'S COMPENSATION FUND, *supra* note 85, at 5.

138. Kemper, Selby & Simmons, *supra* note 27, at 1133; Murphy, *Pitfalls in Medical Malpractice Panel Practice*, 29 RES GESTAE 178, 180-81 (1985).

139. *See supra* note 85-87 and accompanying text.

140. *See supra* note 67 and accompanying text. *See, e.g.,* Aldana v. Holub, 381

3. *Impact of the By-Pass Amendment.*—As noted above, a 1985 legislative amendment authorized the filing of small claims (<\$15,000) directly in state court.¹⁴¹ Some commentators anticipated that this authority would generate a flood of claims filed in court and effectively undercut Indiana's malpractice reforms.¹⁴² As a matter of fact, this by-pass amendment has rarely if ever been used.¹⁴³

The availability of the by-pass amendment did not provide significant incentives for plaintiffs to change their strategy for bringing malpractice claims. No statistically significant difference emerged in the number of paid claims between \$15,001 and \$50,000 compared to claims between \$1 and \$15,000 for the pre-amendment time period (Sept. 1, 1982 to Aug. 31, 1985) and the post-amendment time period (Sept. 9, 1985 to Aug. 31, 1988). There was also no statistically significant difference in the amount that claimants in the \$1-\$15,000 group actually received before and after the passage of the amendment in either current or constant dollars.

4. *PCF Performance.*—Of the 410 PCF claims from 1975 through 1988 analyzed in this evaluation, the great majority of PCF claims were settled. Only twenty-one claims were paid after court proceedings were initiated, and one claim was settled after trial and appeal. After claims reached the PCF, recoveries were very generous. The mean payment for claims paid at \$100,000 or above (including a few claims paid at \$100,000 from primary insurance only) was \$405,297.¹⁴⁴ The average degree of severity of injury ranged from major permanent disability to total disability. About 14.9% of PCF claims involved injuries to infants at birth, and 29.8% were wrongful death cases.

The PCF's financial condition has been a persistent concern from the beginning. The PCF really has been financed on a "pay-as-you-go" basis, rather than on a system in which surcharges are calculated according to actuarial projections of the PCF's future liabilities. Since 1975, the PCF surcharge has generated \$150.8 million in revenue, and the PCF

So. 2d 231 (Fla. 1980); *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980). In these cases, courts found panel review processes unconstitutional because of delays. However, in *Cha*, 476 N.E.2d 109, the Indiana Supreme Court distinguished these cases on grounds that Indiana's statutory scheme was different. See also Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499, 524 & n.109 (1989).

141. See *supra* note 25 and accompanying text.

142. See Murray, "Small Claims" Suits: Legislative Erosion of the Medical Malpractice Act, MARION COUNTY MED. SOC'Y BULL., Feb. 1986, at 10-11.

143. The Indiana Department of Insurance has no record of this procedure being used in any claim. (The Act requires health care providers and insurers to report the disposition of all malpractice claims. See *supra* note 54 and accompanying text.)

144. See *supra* note 122 and accompanying text.

has paid \$135.3 million in claim payments.¹⁴⁵ A transfer of \$7.2 million from the reserves of the state's Medical Malpractice Joint Underwriting Commission saved the PCF from insolvency in 1984.¹⁴⁶ In 1988, the PCF collected \$41.3 million from the surcharge and paid \$21.5 million for claims, leaving a balance of \$29.8 million.¹⁴⁷ The surcharge to finance the PCF has risen substantially since the Act's inception. From 1975 through 1982, the surcharge on providers to support the PCF was 10% of malpractice premiums.¹⁴⁸ By 1988, the surcharge increased to 125%.¹⁴⁹

5. *Malpractice Insurance Premiums.*—Given these trends, it is interesting that Indiana's malpractice insurance premiums have remained low compared to other states. According to a GAO study, Indiana health care providers continue to pay among the lowest malpractice insurance premiums in the nation.¹⁵⁰ Specifically, Indiana physicians pay lower premiums compared to physicians in neighboring states of Ohio, Michigan, Illinois, and Kentucky.¹⁵¹

For example, the Medical Protective Company, a major malpractice insurer in Indiana, Michigan and Ohio, charged lower premiums in Indiana compared to Michigan and Ohio. Medical Protective reports the following annual premiums for malpractice insurance of \$100,000 per occurrence and \$300,000 total for nonsurgeons in January 1989: Indianapolis, IN-\$988, Cincinnati, OH-\$2,291, Cleveland, OH-\$2,579, Kalamazoo, MI-\$4,881, and Detroit, MI-\$7,953.¹⁵² For Medical Protective's highest premium category (OB/GYNs and neurosurgeons), annual malpractice premiums in January 1989 were as follows: Indianapolis, IN-\$8,398, Cincinnati, OH-\$19,474, Cleveland, OH-\$21,922, Kalamazoo, MI-\$43,929, and Detroit, MI-\$71,577.¹⁵³ The cost of malpractice insurance increased dramatically with the PCF surcharge. For example, in Indianapolis in January 1989, malpractice insurance costs (primary insurance premium plus PCF surcharge) were \$2,223 for nonsurgeons and \$18,896 for OB/GYNs and neurosurgeons.¹⁵⁴ In comparing the cost of insurance,

145. IND. DEP'T OF INS., INDIANA PATIENT'S COMPENSATION FUND, *supra* note 85, at 1.

146. GEN. ACCOUNTING OFF., CASE STUDY ON INDIANA, *supra* note 14, at 6.

147. IND. DEP'T OF INS., INDIANA PATIENT'S COMPENSATION FUND, *supra* note 85, at 66.

148. *Id.* at 61.

149. *Id.*

150. GEN. ACCOUNTING OFF., MEDICAL MALPRACTICE INSURANCE COSTS, *supra* note 12, at 30, 59-69; GEN. ACCOUNTING OFF., SIX CASE STUDIES, *supra* note 91, at 15-16. See generally F. SLOAN & R. BOVBJERG, *supra* note 88, at 5-6.

151. Mullen, *supra* note 12, at 5-13 to 5-14.

152. *Id.*

153. *Id.*

154. *Id.*

it is crucial to appreciate that a physician receives total protection against liability in Indiana, while physicians in other states are still liable for claims in excess of policy limits.

6. *Litigation Costs*.—Under Indiana's system, attorney's fees are limited for claims paid from the PCF,¹⁵⁵ ostensibly to maximize payments to claimants. Although it appears that Indiana claimants with large claims pay less than under a common law system because of the cap on fees, reason for concern exists because plaintiffs' attorneys have been able to charge expenses in addition to attorney's fees which effectively increase the total payment to attorneys under the capped system.

Regarding defense costs, Indiana compares very favorably to other states. The Medical Protective Company reports that its defense costs were markedly lower in Indiana than in either Ohio or Michigan. Specifically, between 1984 and 1988, it cost Medical Protective 46% more in allocated loss adjustment expenses to close claims in Ohio and more than 100% more in such expenses to close claims in Michigan.¹⁵⁶

7. *Use of Structured Settlements*.—Periodic payments of primary insurers and the PCF have been used extensively in structured settlements of PCF claims. Of the 264 PCF claims settled between 1985 and 1988, 32.6% involved periodic payments. Also, 23.9% of PCF claims during this period involved contributions from multiple health care providers or their insurers to activate the PCF. This data suggests that insurers find the periodic payment option attractive in settling claims.

Periodic payments and associated structured settlements are ostensibly designed to ensure that damage awards will remain available to claimants through the course of their need for compensation.¹⁵⁷ Structured settlements are particularly useful given some evidence that a significant number of plaintiffs exhaust large damage awards quickly and continue to have needs not met by the damage award.¹⁵⁸ In many Indiana claims, use of periodic payments has resulted in creatively structured settlements that enabled the claimant to receive compensation worth more than the \$500,000 cap. However, there is concern that claimants actually receive very little in present compensation after attorney's fees.¹⁵⁹ Also, in a very few cases, serious abuses have occurred.¹⁶⁰

155. See *supra* note 43 and accompanying text.

156. Gronfein & Kinney, *supra* note 122.

157. Ferguson, *Making a Client Whole: Rhetoric or Reality*, 12 S.U.L. REV. 281, 286 (1986); Mareello, *Periodic Payment Plans: Are Annuities Adequately Protecting the Personal Injury Plaintiff From Inflation, Providing Accurate Attorney's Fees and Promoting the Compensatory Goal of Our Tort Law System?*, 12 OHIO N.U.L. REV. 271, 281 (1985).

158. Mareello, *supra* note 157, at 271.

159. Hallinan & Headden, *Malpractice Laws Stacked Against Victims*, *supra* note 15, at 8.

160. Indeed, in one dramatic illustration of such abuses, St. Paul Fire and Marine

8. *Compliance With Reporting Requirements.*—It appears that insurers and counsel for the parties are not complying with reporting requirements regarding malpractice claims.¹⁶¹ In creating the data base on closed claims, many gaps were found in data required to be reported to the Department of Insurance, such as attorney's fees and expenses incurred in pressing or defending the claim, settlement, or judgment amounts.¹⁶² With respect to these fees and expenses, itemized and total attorney's costs were collected under the survey instrument for both plaintiff and defense counsel. Defense fees and expenses were missing in 75.7% and 78% of closed claims, respectively. However, the total unitemized amount of fees and expenses to defend a claim was missing in only 18.4% of closed claims. Plaintiffs' attorneys were better at reporting their itemized fees and expenses (56.7% and 58.6% missing respectively), but worse than defense counsel at reporting total costs, a figure missing in 41.9% of closed claims.

9. *Subrogation, Statutory Liens, and the Collateral Source Rule.*—In a capped system, the operation of various remedies and rules that accord rights to third parties to share in the claimant's tort recovery, or require reductions in the claimant's recovery to adjust for compensation from other sources, raises important concerns. While these rights and rules may be analytically appealing as preventing possible windfalls to claimants in an abstract sense, their fairness must be questioned in a capped system. Specifically, when a damage cap sets a categorical limit on what can be awarded and also permits attorneys to be paid off the top, the possibility exists that claimants may actually get very little after other third parties have received reimbursement of their expenses.

Indiana has adopted several statutory lien authorities to permit hospitals,¹⁶³ worker's compensation insurers,¹⁶⁴ and the state Medicaid

Insurance Company agreed to settle a case with a claimant by paying \$100,000 to get the case to the PCF if the claimant agreed to repay St. Paul \$25,000 out of the settlement received. The claimant subsequently reported this arrangement to the Indiana Attorney General, and the Indiana Department of Insurance did persuade St. Paul to repay this \$25,000 to the claimant. See Hallinan, *Insurer's Proposal for \$25,000 'Loan' Draws State's Ire*, Indianapolis Star, June 26, 1990, at 8.

161. See *supra* § II(B)(5) and accompanying text.

162. IND. CODE § 16-9.5-6-2 (1988). See *supra* note 54 and accompanying text.

163. IND. CODE § 32-8-26-1 (1988).

164. *Id.* at §§ 22-3-2-13, -7-36. See *Dearing v. Perry*, 499 N.E.2d 268, 270 (Ind. Ct. App. 1986). See generally R. KEETON & A. WIDISS, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES* § 3.10(a)(7), at 232-233 (1988).

program¹⁶⁵ to obtain reimbursement from plaintiffs' tort recoveries. Indiana common law recognizes the right of health insurers, pursuant to contract, to recover reimbursement for medical expenses from tort recoveries of their insureds.¹⁶⁶ Also, as noted above,¹⁶⁷ the Indiana legislature abrogated the common law collateral source rule, which prohibited evidence at trial of other sources of compensation for the plaintiff.¹⁶⁸

These various authorities have been invoked in 2.3% of all closed claims between 1975 and 1988, for a total of \$2,931,482. PCF claimants, however, have been disproportionately affected by this practice and were three times more likely to have liens imposed against them, an overall rate of 8%. In fact, 68% of all the liens imposed were against PCF claimants. The mean and median current dollar lien amount imposed against all closed claims was \$62,372 and \$21,113, respectively. On average, these liens represented 20.4% of what the claimant received in compensation of the claim. The Indiana Medicaid program imposed the majority of these liens, while Blue Cross and Blue Shield of Indiana, Inc., the Medicare program, and hospitals imposed a few.

Operation of these rights of third parties to recover against malpractice awards has produced some harsh results. In one case, the lien was \$605,075 — \$129,873 more than the plaintiff was permitted to receive under the cap! In several instances, claimants have received very little from a large recovery because third parties, as well as the plaintiff's attorney, have been paid first.¹⁶⁹

165. IND. CODE § 12-1-7-24.6 (1988).

166. See, e.g., *Costellow v. Mutual Hosp. Ins., Inc.*, 411 N.E.2d 506 (Ind. Ct. App. 1982); *Hagerman v. Mutual Hosp. Ins., Inc.*, 175 Ind. App. 293, 371 N.E.2d 394 (1978). See generally R. KEETON & A. WIDISS, *supra* note 167, § 3.10(a)(7), at 228-232.

167. See *supra* note 124 and accompanying text.

168. IND. CODE § 34-4-36-1 (1988). See generally Wilkins, *A Multi-Perspective Critique of Indiana's Legislative Abrogation of the Collateral Source Rule*, 20 IND. L. REV. 399 (1987). Under Indiana's rule, the trier of fact calculates reductions in awards for collateral benefits received. Life insurance payments and other death benefits, insurance benefits directly paid for by the plaintiff or his family, and governmental benefits received by the plaintiff before trial are excluded, but worker's compensation is not. Ind. Code § 34-4-36-1 (1988).

169. The following letter from a 43-year-old PCF claimant dramatically illustrates the injustice that can result from imposing such liens in a capped system:

During April of 1981, I became a victim of medical malpractice. . . . To meet his one hundred thousand dollar (\$100,000.00) obligation, Dr. [Defendant] purchased an annuity that will mature in fifteen (15) years. According to my attorney, I will be awarded four hundred thousand dollars (\$400,000.00) on the fifteenth of this month (July 15th, 1987). I feel it is necessary to write to you to show you how that amount will be divided up and thus showing the injustice

IV. CONCLUSIONS

A. *Some Observations*

Indiana's claims are adjudicated and paid under the most comprehensive and severe set of insurance and tort reforms in the nation. Yet, Indiana's malpractice reforms operate in a unique fashion that softens the expected impact of these reforms and actually results in a compensation scheme that is more generous in several respects than the common law tort system. Under Indiana's system, a variety of subtle incentives apparently encourage malpractice insurers and health care providers to settle claims, particularly large claims eligible for PCF payment, with less concern for defendant's fault than expected. Once a claim reaches the PCF, the provider's primary insurance policy usually has been exhausted, and in any event, the insurer no longer has any real obligation to defend the claim. Because medical review is an optional and costly proceeding, insurers have much to gain and little to lose by expeditiously

of the state's medical malpractice system.

During the last five and one half (5.5) years, the Indiana State Department of Public Welfare (through Medicaid) has spent two hundred thirty-nine thousand eighty-two dollars and forty two cents (\$239,082.42) for my care as of mid-June 1987. A lien for this amount has been filed and must be honored accordingly. The attorney fees are one hundred thousand dollars (\$100,000.00) plus expenses incurred for this case. Those expenses have been set at thirty thousand dollars. The balance is the actual compensation I'll receive until the annuity matures. The following table illustrates the settlement's division.

\$400,000.00	Amount to be received July 15
239,082.42	To the State Welfare Department
130,000.00	Attorney fees and expenses
30,917.58	TO THE VICTIM

By July 15th, Medicaid will probably increase the lien by two thousand dollars (\$2,000.00).

The Malpractice incident resulted in the loss of function in my left arm and both legs. I also lost bladder and bowel control making the possibility of employment almost impossible. I'm living in a nursing home and my part of the settlement will not cover one year's expenses. This means I'll be back on Medicaid and in fifteen (15) years (when the annuity matures) it will be claimed through a lien by Medicaid.

I'm forty-three (43) years old. If financially able to do so I could live on my own with an attendant, but I've lost more than bodily functions. I've also lost independence and my liberty. That loss of independence and liberty was through medical malpractice yet as the victim, I'll not be allowed to regain my liberty and independence through just compensation.

Letter from malpractice claimant to Indiana Commissioner of Insurance (July 4, 1987) (available from The Center for Law and Health, Indiana University School of Law—Indianapolis, Indianapolis, IN 46202).

pushing claims — particularly claims with considerable damage — to the PCF without adjudicating fault in the medical review panel process.

By law, the PCF can only decide damage and must assume that the defendant's liability is admitted. Consequently, the factors that influence the final payment of claims in the common law tort system, such as, what a jury will find on liability or the future expenses involved in pressing a claim through trial, are not considered in the final decision on the claimant's compensation. In these respects, Indiana's system is similar to no-fault compensation systems that pay claims more efficiently with little regard for fault.

Of particular interest, Indiana claimants with large claims get substantially more than their counterparts in Michigan or Ohio.¹⁷⁰ Most importantly, claimants in the aggregate are better off because they get more compensation for their injuries. It is crucial to remember that claimants who receive large malpractice payments have been seriously and tragically damaged and deserve the compensation they receive. Perhaps Indiana's reforms have provided a more efficient way to manage the resolution of such large claims fairly while still according providers and private insurers more predictability regarding claim severity and defense of malpractice claims, thereby permitting these insurers to maintain more stable underwriting and premium practices.

B. Some Concerns

There are, however, some features of Indiana's malpractice system that are troublesome. These features are: (1) Delays in the medical review panel process; (2) the backlog of open claims; (3) the fairness of allowing third parties to obtain reimbursement from malpractice awards in a capped system; (4) increases in the PCF surcharge and the solvency of the fund over time; and (5) poor compliance with reporting requirements.

1. *The Medical Review Panel Process.*—Delays in the medical review panel process are troubling and are probably due to practical difficulties in scheduling the busy professionals on the panel — three physician panel members, the attorney chairman, counsel for the parties, and the defendants. It may be worthwhile to search for more efficient and streamlined procedures for expert review of claims, including permitting optional "paper" review of submissions before all panel members without convening an oral hearing. In any event, it should be appreciated that even with the delays and expense involved in a medical review panel proceeding, it is still cheaper and probably faster to proceed with the medical review panel system than to revert to the common law tort system.

170. See *supra* notes 130-33 and accompanying text.

2. *The Backlog of Open Claims*.—A second major concern is the backlog of open claims. As discussed above, as of December 31, 1988, more than two-thirds of claims filed under the Act remained opened.¹⁷¹ The study did collect data on the open claims, many of which were quite old and on which there had been little action in recent years. Policy-makers in the Department of Insurance, as well as the bar, should give some thought as to why this backlog exists. Some questions to consider: Are many small claims simply languishing with plaintiffs' counsel not actively pursuing the claims? Are counsel and insurers failing to report to the Department of Insurance that claims are closed? Or, is the system simply too inefficient to adjudicate claims expeditiously? Also, what is the potential exposure to the primary coverage and the PCF of these open claims?

The 1990 case, *Eakin v. Mitchell-Leech*,¹⁷² could compound the problem of the backlog to the extent the backlog includes claims filed before 1985. In this case, the court of appeals with the effective concurrence of the Indiana Supreme Court has condoned the practice of primary insurers to include extensive future payments within the required \$100,000 primary insurance payment required for PCF eligibility.¹⁷³

3. *Third Party Rights to Malpractice Awards*.—The rights of third parties to obtain reimbursement from claimants' recoveries in a capped system raise troubling issues of fairness. In brief, in a system in which the legislature has imposed a cap on recoverable damages to achieve other policy goals such as the availability and affordability of malpractice insurance for health care providers, it may be unfair to place the rights of third parties ahead of the claimant who has already been called upon to expect limited compensation to meet other societal goals. Medicaid liens also raise more complicated issues because Medicaid eligibility rules require applicants to deplete resources to become eligible for benefits. Nevertheless, future medical expenses represent only part of special and general damages that also include losses due to inability to work and pain and suffering,¹⁷⁴ or, in the case of wrongful death, losses to the survivors resulting from the tortious death.¹⁷⁵ Allowing third parties to receive full payment from claimants' damage awards under a capped system erroneously assumes that claimants' damages are basically medical expenses.

171. See *supra* §§ III(A)(1) and III(D)(2).

172. 557 N.E.2d 1057 (Ind. Ct. App. 1990), *trans. denied*, No. 45A02-8807-CV-213 (Feb. 8, 1991).

173. See *supra* note 46 and accompanying text.

174. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 8.1, at 540-551 (1973).

175. *Id.* § 8.3, at 556-557.

4. *The PCF Surcharge.*—This study did not address the financial condition of the PCF. Nevertheless, the facts that the surcharge has increased over 100% and that the PCF needed an infusion of substantial sums in 1985 to remain solvent¹⁷⁶ are of concern. One possible reason for the increase is that it was not fixed at actuarially sound levels at the PCF's inception in 1975. A second possibility is that the state has not aggressively defended claims that reach the fund. The fact that PCF claims have been paid at generous levels lends credibility to this second possible explanation of why the PCF surcharge has increased so markedly since 1975.¹⁷⁷ In a recent article in the *Indianapolis Star*, the Commissioner of Insurance was quoted, stating: "We feel like the fund [PCF] has not been adequately defended We have been paying out 50% more than we should have been."¹⁷⁸

5. *Compliance with Reporting Requirements.*—Finally, insurers and counsel for the parties are not complying with statutory reporting requirements regarding malpractice claims.¹⁷⁹ Consequently, there is inadequate data at the state level to determine if affected parties are complying with the requirements of the Act, particularly with respect to setting attorney's fees and structuring settlements.

C. Conclusion

Nevertheless, Indiana's experience, particularly for large claims, suggests that relatively subtle administrative arrangements for the management of claims at the state level influence whether claimants can be treated fairly in a system that is tightly structured to control claim severity, and thus control the price and availability of malpractice insurance for providers. Clearly, pragmatic approaches that seek to control frequency and severity of claims can be designed in a way that also facilitate more efficient and fair compensation of medical injuries. Indiana's experience should caution reformers, critics, and other observers to look more closely at the detailed aspects of how a system operates in practice before coming to intuitively appealing conclusions about the fairness of apparently strict changes in the common law tort system, such as damage caps, or the appropriateness of modifying the current medical malpractice system.

176. See *supra* notes 145-47.

177. See *supra* § III(D)(1) and accompanying text.

178. Hallinan, *Busy Agency Slow in Settling Medical Malpractice Claims*, *Indianapolis Star*, Feb. 27, 1991, at E3.

179. See *supra* §§ II(B)(5) and III(D)(8).

APPENDIX A

Data from this study is from the Indiana Malpractice Claims Data Base (IMDB) obtained from all Indiana malpractice claims filed with the Indiana Department of Insurance from 1975 through 1988. Collected data falls in three categories: Claims, claimants, and defendants. Data on claims includes: (1) Filing date; (2) date of final disposition; (3) allegations of negligence; (4) medical review panel decision, if any; (5) results of court proceedings, if any; (6) amount of award, if any; and (7) nature of final disposition. On claimants, data includes: (1) Demographic characteristics of claimants, for example, age, sex, marital status, and residential county and zip code; (2) claimant's medical condition giving rise to the malpractice, including initial diagnosis and any misdiagnosis, if any; (3) any operations or procedures performed on the claimant; (4) injuries sustained during the incident of alleged malpractice, including initial injury and ultimate injury; and (5) severity of injury. On physician defendants, data elements include: (1) Date of licensure; (2) medical education; (3) location of practice; (4) self-reported specialty; (5) nature of medical practice; and (5) board certification. For hospital defendants, data includes: (1) Bed size; (2) type of corporate control; (3) teaching status; (4) geographic location; and (5) case mix.

For claimant characteristics and damage awards, this study used the data collection instrument developed by the General Accounting Office for its study of claims closed in 1984.¹⁸⁰ Whenever possible, information on diagnosis, procedures performed, and injuries came directly from the patient's hospital chart for the treatment episode within which the alleged malpractice occurred. A registered medical records administrator has coded data on diagnoses, injuries, procedures, and operations using the ICD-9-CM disease classification system.¹⁸¹

For allegations of negligence, this study used the classification categories developed by the Risk Management Foundation (RMF) of the Harvard Medical Institutions.¹⁸² The RMF protocols provide for seventy-seven individual allegations of negligence, which may be grouped into twelve larger categories: (1) Diagnosis, (2) anesthesia, (3) surgery, (4) medication, (5) medication administration, (6) intravenous procedures, (7) obstetrics, (8) treatment, (9) patient monitoring, (10) biomedical

180. GEN. ACCOUNTING OFF., *MEDICAL MALPRACTICE: CHARACTERISTICS OF CLAIMS CLOSED IN 1984* (1987).

181. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HEALTH CARE FIN. ADMIN., *ICD-9-CM: INTERNATIONAL CLASSIFICATION OF DISEASES, 9TH REVISION, CLINICAL MODIFICATION* (1980).

182. See RISK MANAGEMENT FOUND., *RISK MANAGEMENT FOUNDATION INFORMATION SYSTEM* (1987).

equipment, (11) blood products, and (12) other allegations not elsewhere classified.

Severity of injury was classified according to the nine-level system developed by the National Association of Insurance Commissioners.¹⁸³ Categories included: (1) Emotional only (for example, fright); (2) insignificant (for example, lacerations, contusions, rash); (3) minor temporary disability (for example, infections, improperly set fracture leading to delayed recovery); (4) major temporary disability (for example, burns, surgical material left in patient, recovery delayed); (5) minor permanent partial disability (for example, loss of fingers); (6) major permanent partial disability (for example, deafness, loss of limb, loss of one kidney); (7) major permanent total disability (for example, paraplegia, brain damage); (8) grave permanent total disability (for example, quadriplegia, severe brain damage); and (9) death.

183. NAT'L ASS'N OF INS. COMM'R, MEDICAL MALPRACTICE CLOSED CLAIMS, 1975-1978, at 8 (1980).

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